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FEDERAL GOVERNMENT'S RELATIONSHIP WITH AMERICAN INDIANS

HEARINGS

BEFORE THE

SPECIAL COMMITTEE ON INVESTIGATIONS

OF THE

SELECT COMMITTEE ON INDIAN AFFAIRS

UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

FEDERAL GOVERNMENT PROTECTION OF NATURAL RESOURCES AT THE ARKANSAS RIVERBED IN OKLAHOMA AND THE HOPI RESERVATION IN ARIZONA

MAY 18, 1989
WASHINGTON, DC

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FEDERAL GOVERNMENT PROTECTION OF NATURAL RESOURCES AT THE ARKANSAS RIVERBED IN OKLAHOMA AND THE HOPI RESERVATION IN ARIZONA

THURSDAY, MAY 18, 1989

U.S. Senate,
Special Committee on Investigations,
Select Committee on Indian Affairs,
Washington, DC.

The special committee met, pursuant to recess, at 10:07 a.m., in room 485, Russell Senate Office Building, Hon. Dennis DeConcini (chairman of the committee) presiding.

Present: Senators DeConcini, McCain, Daschle, Nickles.

Staff present: Ken Ballen and Michael Anderson.

STATEMENT OF HON. DENNIS DeCONCINI, U.S. SENATOR FROM ARIZONA, CHAIRMAN, SPECIAL COMMITTEE ON INVESTIGATIONS OF THE SELECT COMMITTEE ON INDIAN AFFAIRS

Senator **DeConcini**. The Special Committee on Investigations will come to order.

We are going to proceed with the Federal Government's role in protecting natural resources on Indian lands today. Last January the special committee heard testimony concerning the Federal Government's failure to protect natural resources on Indian lands on the Arkansas Riverbed in Oklahoma.

Today Chief Wilma Mankiller of the Cherokee Nation, Chief Hollis Roberts of the Choctaw Nation, and Governor Bill Anoatubby of the Chickasaw Nation will testify further on the serious economic loss their tribes have suffered due to the Government's failure to survey the Arkansas Riverbed.

The failure of the Government to clear title to the riverbed is another example of the Government's breach of the trust responsibility to Indian tribes.

Would the three of you please come forward and raise your right hand?

[Witnesses sworn.]

Senator **DeConcini**. Mr. Anderson.

Mr. **Anderson**. Welcome Chief Mankiller, Governor Anoatubby, and Chief Hollis Roberts of the Choctaw Nation.

Could you please give the committee a brief summary of the problem that you are concerned with today?

STATEMENT OF WILMA MANKILLER, PRINCIPAL CHIEF, CHEROKEE NATION, TAHLEQUAH, OK

Chief **Mankiller**. Mr. Chairman, my name is Wilma Mankiller. I am the principal chief of the Cherokee Nation of Oklahoma. Here to testify with me today are two of my colleagues, Governor Bill Anoatubby of the Chickasaw Nation, and Chief Hollis Roberts of the Choctaw Nation. Also joining us is Tina Jordan, the executive director of the Arkansas Riverbed Authority. We appreciate the opportunity to present to the Special Committee on Investigations our concerns about the Federal Government's failure to fulfill its trust responsibilities and properly manage our tribal lands in the Arkansas Riverbed.

I first want to take a moment to thank the special committee for its examination of issues of concern to Native Americans. I fully support the committee's work in identifying ways to strengthen tribal government and aggressively protect Native American human and natural resources. While I may not have agreed with every issue examined, in light of the whole record I believe this committee has addressed the right issues fairly and completely.

I know this work has not been easy or always popular, but that's why I want to congratulate you for tackling the controversial issues that needed airing, including charges of oil company theft, tribal corruption, sexual abuse of school children, and most particularly Government mismanagement of tribal lands and natural resources.

I look forward to continuing to work with you on these and other issues of concern to Native Americans.

We have written testimony that is very extensive that we would like entered into the record. But what I want to do is just very briefly summarize our overall issue today.

The sad history of the Cherokee Nation's ownership of its portion of the Arkansas Riverbed I think is worth pointing out. Over 100 years ago we acquired by treaty more than 14 million acres of land in eastern Oklahoma bordered on the south generally by the Arkansas River and on the east along the line commencing at the point that the Grand Neosho River joins the Arkansas River.

We feel, in our tribe, that we paid for that 14 million acres of land with many lost lives and much lost land in the Southeastern part of the United States. Eventually, most of the 14 million acres of tribal lands were allotted and transferred to individual tribal members. After Oklahoma became a State, the Department of the Interior, our trustee, erroneously determined in 1908 that title to the Arkansas Riverbed had passed to the State, not to the three tribes.

After repeated attempts to challenge that determination, the three tribes finally successfully sued the State of Oklahoma for an accounting of oil and gas revenues it was receiving from the riverbed.

The U.S. Supreme Court determined in 1970 that, in fact, the Cherokee, Choctaw, and Chickasaw Nation always had fee simple title in the 96-mile stretch of the Arkansas River.

We have paid an awfully heavy price for relying on the erroneous legal opinion of our trustee in 1908. We have continued to lose millions of dollars by our trustee's failure to fulfill its trust obligations to properly manage the riverbed lands after they were confirmed and redesignated as tribal land.

To me, today, as we look at the issue of the Arkansas Riverbed, it is, indeed, a very sad state of affairs when our tribe has to resort to litigation to force the Department of the Interior to protect our land. We have had to litigate this issue since 1908.

To us, the Arkansas Riverbed represents almost 80 years in pursuit of rights and tribal lands at great cost in lost surface and subsurface leasing revenues, sand and gravel resource destruction, and litigation expenses. We will not rest until we are fairly compensated for these losses.

With those comments I'd like to again thank this special committee for the serious attention it has given thus far to the Arkansas Riverbed mismanagement problem. We ask your continued assistance, both with our appropriations efforts and by interceding with other departments and, most significantly, the Corps of Engineers and bureaus of the Department of the Interior which must be actively involved to get these problems resolved.

Thank you.

[Prepared statement of Chief Mankiller appears in the appendix.]

Mr. Anderson. Thank you, Chief Mankiller.

Chief Roberts, could you proceed please?

STATEMENT OF HOLLIS ROBERTS, CHIEF, CHOCTAW NATION, DURANT, OK

Chief Roberts. Mr. Chairman, members of the committee, my name is Hollis Roberts. I am chief of the Choctaw Tribe of Oklahoma. I represent roughly 90,000 Choctaws in my elected responsibility.

I, too, echo the same sentiments that Chief Mankiller has echoed. We do see a dereliction of responsibilities by the Bureau of Indian Affairs in failure to see that their trust responsibilities for Indian tribes were carried out, which is meaning a great economic loss for the Choctaws, the Chickasaws, and the Cherokee Tribes of Oklahoma.

To give you a brief example, we have been in the bingo business for 1 year, which netted the tribe on the Oklahoma/Texas border $727,000 just in 1 year to our part. We would like to do that on the Arkansas/Oklahoma border. We cannot because we have been waiting—I have been a tribal leader for 12 years, and we have been waiting 12 years under my administration to seek this economic opportunity over on the Arkansas/Oklahoma border.

Again, I want to thank the committee for taking the time to investigate and assist in getting the land surveyed for the tribes of Oklahoma.

Mr. Anderson. Governor Anoatubby, please proceed.

STATEMENT OF BILL ANOATUBBY, GOVERNOR, CHICKASAW NATION, ADA, OK

Governor Anoatubby. Good morning Mr. Chairman and members of the committee. It is with great pride and great honor that I appear here today representing the great Chickasaw Nation in Oklahoma.

It is, indeed, an honor, because we are now before some of the representatives of some of the most prestigious bodies in the world—representatives of the U.S. Government. Over the years we have had a very good relationship with the U.S. Government, and that has been handed down by our forefathers to me.

Even though perhaps there have been a great deal of problems that have been suffered within the Bureau of Indian Affairs, we have had a very good relationship with the local people and have been able to attack many of the problems that we have suffered as a result of many, many years of problems that have occurred within the tribe and within the Federal Government.

However, we are, at this point, suffering from what I consider an intolerable situation—a situation where we have assets that have actually been made not available to the tribe. The three tribes represented here can all agree that this particular asset is the single most valuable asset that the three tribes do own.

You have heard the history. You have read the testimony that has been presented by both Chief Wilma Mankiller, myself, and Chief Hollis Roberts concerning the background, concerning the problems that exist as a result of the lack of surveys on the riverbed. If I might reiterate, however, without surveys the tribes do not have access to the property. We cannot utilize the property for whatever purpose the tribes may deem necessary or for what they may wish to use it for.

We have several individuals who have been using this property for many years reaping the benefits, receiving the income. It is just not appropriate that someone else receive the income from the tribes' property. To me that is an intolerable situation when you have trespassers receiving funds that rightfully belong to the tribes.

As I grew up I was taught by my parents to respect authority, to respect those things that are others. I think it is only appropriate that whenever we have assets that others respect them, as well.

I have tribal members that come to me and ask where I am on the Arkansas Riverbed. Have I been able to do anything with the Arkansas Riverbed? Do you have dollars that are now coming into the tribe as a result of the Arkansas Riverbed?

Those lands were ours before the State of Oklahoma existed, and as the result of some mistakes that were made by the Federal Government in saying that that land did not belong to the tribe, as was mentioned in the testimony of Wilma Mankiller, we had to file suit to regain the title which was rightfully ours. Again, that is an intolerable situation.

I'd like for you to consider, from your own standpoint, from a personal standpoint, what you would do if someone was receiving income from property that you rightfully owned. How would you feel about that?

Mr. Chairman, if you had a piece of property in Oklahoma, for instance, that you had owned for many years, and someone just came in and started using it and utilizing it and reaping income from it, how would you feel?

We have been damaged, and it is only appropriate that an honorable party such as the Federal Government take this in your hands and do something about it.

We ask that you, as representatives of the Federal Government, as I mentioned, the most powerful, most prestigious government in the world, take the responsibilities again for the Indian tribes as a serious matter and assist the three tribes in maintaining an asset which is so important to us.

Again I thank you for the opportunity to speak briefly. All the materials that have been presented to you, of course, can be supplemented if necessary. We have many, many documents that we can supply you.

Thank you very much for your time.

[Prepared statement of Governor Anoatubby appears in appendix.]

Mr. **Anderson**. Let's begin by telling the committee how many members are in your tribe. Let's start with you, Chief Mankiller. How many members does the Cherokee Nation currently have?

Chief **Mankiller**. There are about 96,000 registered members. There are probably about 120,000 total, but 96,000 have bothered to register.

Mr. **Anderson**. And Governor Anoatubby, how many tribal members would you represent?

Governor **Anoatubby**. We have about 25,000 members.

Mr. **Anderson**. And Chief Roberts?

Chief **Roberts**. We have 43,000 registered, and approximately 90,000 tribal members.

Mr. **Anderson**. So collectively you would represent or have tribal membership of around 150,000 Indians; is that right?

[No audible response.]

Mr. **Anderson**. And what is your number one natural resources problem for each tribe? Chief Mankiller, what is the number one natural resource problem?

Chief **Mankiller**. Our number one natural resource problem is the Arkansas Riverbed. Unlike some of the tribes in the Southwest, the tribes in eastern Oklahoma have no marketable natural resources. The only natural resource we have is the Arkansas Riverbed.

Mr. **Anderson**. And Governor Anoatubby, what is your number one natural resources problem?

Governor **Anoatubby**. The Arkansas Riverbed problem.

Mr. **Anderson**. And Chief Roberts?

Chief **Roberts**. The Arkansas Riverbed.

Mr. **Anderson**. And the problem is that the tribe does have a claim for title to 96 miles of riverbed; is that right?

Chief **Mankiller**. That's correct.

Mr. **Anderson**. What happens when you come to someone who is on the land and you tell them to get off? What do they tell you? Governor Anoatubby, can you tell us what happens?

Governor **Anoatubby**. As I said, we have intolerable situations sometimes. We had one piece of property that we did plan to survey, and one of the Bureau of Land Management people went down to the site to survey it and the owner ran him off with a shotgun and the U.S. Marshal had to accompany him back in order for him to do the survey.

Mr. **Anderson**. When was that, sir?

Chief **Roberts**. Just last year.

Governor **Anoatubby**. That was just last year, 1988.

Mr. **Anderson**. And Chief Mankiller, in terms of the economic losses suffered by the tribes over the years, would that run into the millions of dollars? How much money has the tribe lost?

Chief **Mankiller**. I would say that it is in the millions of dollars.

Mr. **Anderson**. From the Cherokee Tribe, itself, in lost revenues?

Chief **Mankiller**. From the Cherokee Tribe, itself. We're talking about a loss of revenue from the turn of the century, actually.

Mr. **Anderson**. In the last few years would that also run into the millions of dollars?

Chief **Mankiller**. I would guess so.

Mr. **Anderson**. Chief Roberts, is that also your experience?

Chief **Roberts**. Mr. Anderson, I'd like to answer it this way: for a year now we have been in the bingo business and it has netted us $727,000 on a 5-acre site. We're talking about 22,000 acres. On 5 acres out of the 22,000 I can make $1 million a year for the tribe.

Mr. **Anderson**. So you not only are losing past revenues on the land, but there are economic opportunities that you have lost; is that right?

Chief **Roberts**. In the future. Yes, sir.

Mr. **Anderson**. Of the 96 miles of claims that the Indians have title to there, how many acres have been surveyed as of today? Governor Anoatubby.

Governor **Anoatubby**. There have been approximately 700 acres that have been surveyed, and this was done through an allocation that was made last year in the amount of $30,000 from BLM.

Mr. **Anderson**. How many acres are out there to be surveyed?

Governor **Anoatubby**. In excess of 22,000.

Mr. **Anderson**. So you've got a real problem in terms of getting people off the land if there is no survey in that area; is that right?

Governor **Anoatubby**. You must have a survey in order to go to court to claim your rights to the land.

Mr. **Anderson**. Chief Mankiller, you mentioned some millions of dollars being lost by the tribe in past revenues. Where would that come from? What kind of revenues are lost by the tribe?

Chief **Mankiller**. Well, oil and gas revenues, primarily. We also have talked about developing eastern Oklahoma as a lucrative retirement area. There is potential also for developing a retirement center there along the banks of the Arkansas River. There are a number of economic enterprises.

We have done fairly well in economic development in other areas. We own a manufacturing company, some gift shops, a poultry industry, a wood bundling project, many other projects. We could have also developed some lands along the Arkansas River, but now we are virtually at a standstill.

Mr. **Anderson**. As the chief of the tribe and following this issue for years, have you found it frustrating to deal with this situation?

Chief **Mankiller**. I have found it maddening, actually. It is extremely frustrating.

Mr. Anderson. Is it maddening because you're looking at land owners on the tribal property and there is no way to get at them?

Chief Mankiller. Yes, it is. Yes. Part of my job is to try to do things to stimulate the economy in eastern Oklahoma. The Arkansas Riverbed is one of our assets, and we have been unable to move forward with leasing and development because we don't have surveys that delineable the boundaries of our tribal lands.

Mr. Anderson. And without those surveys there is no legal means to——

Chief Mankiller. That's exactly right. Yes. The people living there actually think that the land belongs to them because they have lived there for a number of years and have developed farms and businesses. Some of them have actually executed leases with the U.S. Army Corps of Engineers. So they are not readily moving off when we say we really own this property.

Mr. Anderson. And without actual proof to the people who live on the land there, there is no way that they wouldn't know that they shouldn't be on the land.

Chief Mankiller. That's exactly right.

Mr. Anderson. So they rightfully think they should be on the land; is that right?

Chief Mankiller. Sure they do.

Mr. Anderson. In terms of the monies lost, what kind of opportunities are lost by the tribe? What would you have done with the money if it was available?

Chief Mankiller. We would have done a number of things. We would have built health clinics, we would have developed more education programs, we would have developed senior citizen centers, we would have built more basic infrastructure. In eastern Oklahoma we are still dealing with issues like lack of indoor plumbing, so we would have provided basic services and those kinds of things.

Mr. Anderson. Would developing natural resources and having them protected by the BIA—is that something that is part of self-sufficiency for the tribe?

Chief Mankiller. Without a doubt. We are very, very interested in self-sufficiency. Fifteen years ago, 75 to 80 percent of our revenue was revenue from the Federal Government. Last year, less than half of our revenue was revenue from the Federal Government. So we are trying to move slowly but surely toward not the rhetoric of self-sufficiency, but actually moving toward real self-sufficiency. That is one of the reasons we have been very aggressive on the Arkansas Riverbed. We are interested in becoming more self reliant.

Mr. Anderson. Chief Roberts, this land was awarded by the Supreme Court to the Choctaw, Chickasaw, and Cherokee Tribes in 1970; is that right?

Chief Roberts. Yes, sir.

Mr. Anderson. In the last few years have there been some efforts by BIA to get some money to survey this property?

Chief Roberts. No, sir, there has not been. In fact, the three tribes have developed an organization called the Arkansas Riverbed Authority to work with the BIA to obtain monies for either us or the BIA to do surveys and studies of the Arkansas River for the three tribes. We have not gotten a response of the bureau going out to BLM to ask for the survey. BLM is the only agency recognized to do surveys for tribes in the United States, so we have to have BLM. The Bureau didn't visit with BLM until 2 years ago. We have been at it, as I said earlier, 12 years trying to get something done.

The Bureau has been negligent. There has been a failure of communication. I'm not sure what the answer is.

Mr. ANDERSON. The tribes——

Senator DECONCINI. Excuse me, Mr. Anderson.

Mr. Roberts, you say you've been 12 years trying to get the BIA to do it?

Chief ROBERTS. Yes, sir.

Senator DECONCINI. What actions did you take to get them to do it?

Chief ROBERTS. The three tribes—at that time, Mr. Ross Swimmer, myself, and Governor James—had sat down numbers of times with the Bureau officials, both at the superintendent's level and the area level——

Senator DECONCINI. Urging them to——

Chief ROBERTS. Urging them to ask for appropriations for money to complete the survey, which was commenced and was funded for 2 years of a 5-year program.

Senator DECONCINI. Did they ever do that?

Chief ROBERTS. They did not.

Senator DECONCINI. They never asked for appropriations?

Chief ROBERTS. I'm not sure whether they asked or not. I've never seen any documentation that indicated that they had asked.

Senator DECONCINI. Then when did you start going to the BLM? Or did you ever go to the BLM?

Chief ROBERTS. Two years ago. October 1987, I believe.

Senator DECONCINI. You started going yourself to the BLM?

Chief ROBERTS. Well, we contacted through the Arkansas Riverbed Authority.

Senator DECONCINI. I'm trying to understand. The BLM has to do the surveys, but you have to work through the BIA?

Chief MANKILLER. Yes.

Chief ROBERTS. Yes.

Senator DECONCINI. Is that the——

Chief ROBERTS. The BIA makes the request on behalf——

Senator DECONCINI. If I understand this now, in 1970 the Supreme Court said that that geographic area known as the Arkansas Riverbed belongs to the three Tribes?

Chief ROBERTS. Yes, sir.

Senator DECONCINI. And since that period of time the BIA has literally dragged its feet or refused to ask for the appropriations or attempt to get the money to conduct the surveys?

Chief MANKILLER. That's correct.

Senator DECONCINI. Is that correct?

Chief ROBERTS. That's correct.

Senator DECONCINI. Do you have any idea what that amount of money would be to conduct those surveys?

Chief MANKILLER. It would be about $1.5 million.

Senator DECONCINI. For all of them?

Chief **Roberts**. To complete the necessary surveys it would be $1.5 million.

Senator **DeConcini**. To do all those surveys it would be $1.5 million?

Chief **Mankiller**. Yes.

Senator **DeConcini**. To survey all that land? Are you capable of doing that yourself?

Chief **Mankiller**. Yes.

Chief **Roberts**. Yes.

Chief **Mankiller**. But I don't know legally whether there is a way we can do that. We've actually met with BLM in the last year and told them we'll do this ourselves if they will just come and give us a stamp of approval and say that our surveys have been done properly, and there is some legal barrier to doing that.

Senator **DeConcini**. Is there anything in the court decision that says the BIA through the BLM must do the survey? Is there any restriction?

Chief **Mankiller**. There is some kind of a——

Chief **Roberts**. Any time a tribe wins a lawsuit in Federal court and obtains land or money it is placed automatically in trust to the U.S. Government.

Senator **DeConcini**. I see.

Chief **Roberts**. Which is administered by the BIA.

Senator **DeConcini**. So legally it is their responsibility to do the survey?

Chief **Mankiller**. Yes.

Chief **Roberts**. Right.

Governor **Anoatubby**. There is a statute that would prohibit anyone else from doing that.

Chief **Mankiller**. The BIA asked BLM, and——

Senator **DeConcini**. Do you have the funds to do the survey?

Chief **Roberts**. We do not.

Senator **DeConcini**. You don't have the funds to do the survey. If you had 638 contracts you could do the survey, if they would agree to do that?

Chief **Mankiller**. Sure.

Senator **DeConcini**. Do you know any prohibition of giving such contracts for surveys to the tribe? I don't. I'm just asking.

Chief **Roberts**. There is not a prohibition. There is a statute that may say that if a survey is certified by someone other than BLM it is not good. The land cannot be exchanged, bought, sold, or bartered.

Governor **Anoatubby**. I just imagined that the BLM would have to certify the survey and would have to be on site.

Senator **DeConcini**. To actually have them certify them or have them subcontract or something.

Governor **Anoatubby**. And there is another matter that is a real problem. Once the survey work is completed, there is a length of time—I think 27 months—from the time the survey is completed until the survey is certified. As we mentioned earlier, some of the property has been surveyed, approximately 700 acres, and we still have not received the certified surveys on that. That was done over a year ago.

Senator DeConcini. Have you consulted or taken any legal action toward the BIA for not doing the survey?

Governor Anoatubby. The Chickasaw Nation has not.

Chief Roberts. I think the Cherokees are moving in that direction.

Chief Mankiller. Yes; we filed a complaint.

Senator DeConcini. You have filed a complaint in Federal court——

Chief Mankiller. Yes; we have.

Senator DeConcini [continuing]. Mandating or forcing or ordering them to do it?

Chief Mankiller. It doesn't just deal with the survey, it deals with the dereliction of duty—the failure of the Bureau——

Senator DeConcini. The trust responsibility?

Chief Mankiller. Yes; to exercise trust responsibility.

Senator DeConcini. I would say so.

Chief Mankiller. Yes.

Senator DeConcini. Now, if I understand it, because it seems to me not impossible through the appropriation process to get $1.5 million designated as a 638 contract or something, to have this survey completed——

Chief Mankiller. Sure.

Senator DeConcini. If that is all the problem, to your knowledge that's all the problem? There isn't some court restraint or something hanging over our heads here that we don't know about?

Chief Mankiller. No; in fact, Senator Inouye visited eastern Oklahoma and we flew him over the Arkansas Riverbed. He indicated to us that he would support an appropriation to get the surveys done.

Senator DeConcini. When did he do that?

Chief Mankiller. He did that about 3 weeks ago.

Senator DeConcini. Very good. We have an appropriation bill coming up.

Chief Mankiller. We caught him while he was in a good mood.

Senator DeConcini. We will support Senator Inouye completely. Maybe he is already working on that.

Governor Anoatubby. Mr. Chairman, there are other matters that would have to be taken care of after this survey work is completed.

Senator DeConcini. I was going to ask you that in 1 minute, but go ahead.

Governor Anoatubby. The Federal Government, of course, has the responsibility of clearing the title for us, which then would bring in the Office of the Solicitor. Of course, we have had a great deal of cooperation since Mr. Tim Vollmann has come to the Solicitor's Office in Tulsa. But I don't think that they will be funded properly either to do the litigation that is necessary. There will need to be litigation support funds.

Senator DeConcini. Certainly the quiet title to 96 miles is a lot of land and probably many, many people who are on it. Do you have any idea how many?

Chief Roberts. Roughly 1,000 cases will be——

Senator DeConcini. So 1,000 cases are there that would claim title?

Chief **Mankiller**. Sure.

Chief **Roberts**. That's an added burden to the—I was under the impression eight staff members, maybe eight attorneys in Tulsa with the Solicitor's Office—we have already a backlog in filing some probate cases running roughly about 100 a month. If he is bogged down now with eight attorneys or staff members, he is really in for some serious troubles once this thing is kicked out there with 1,000 new cases in front of him.

Senator **DeConcini**. He might be able to combine a lot of those. I don't know the situation well enough. But it will certainly be a big job.

But, of course, you are assuming that the survey is going to take in all those 1,000 people.

Chief **Roberts**. Assuming. Yes.

Senator **DeConcini**. We would have to wait for that determination to be made to see exactly how many we're talking about. How long would it take to do the survey?

Chief **Roberts**. It would take roughly a year and a half to do the survey, and 27 months to certify them.

Senator **DeConcini**. Now, your estimations about how much natural resources the tribe has not had because someone else is there, how do you substantiate those figures? Are those estimates?

Chief **Roberts**. Those are estimates, but I think there will be testimony after us——

Senator **DeConcini**. Yes, there are other witnesses. Are they going to——

Chief **Roberts**. They're going to testify to that and address that.

Senator **DeConcini**. Thank you.

Mr. Anderson.

Mr. **Anderson**. Let me ask the three chiefs generally: In sworn testimony before this committee, Merritt Youngdeer, the area director in Muskogee, said that the Government has failed to protect the resources there and has failed in its responsibility. Does that surprise you in any way?

Chief **Mankiller**. No; it does not surprise me. Our former principal chief, Mr. Keeler initiated this process, and our other principal chief, Mr. Swimmer tried to develop the Arkansas Riverbed, and then I have continued this effort. We have all met with frustration. It doesn't surprise me at all.

Someone said yesterday that, in fact, the Department of the Interior did not even request surveys from BLM until 1987. Governor Anoatubby noted that perhaps they didn't have the phone number for the BLM. [Laughter.]

Mr. **Anderson**. We can send that to them.

Governor **Anoatubby**. Now that they have the phone number, they can make the telephone call.

Mr. **Anderson**. In terms of the tribe having to bring a lawsuit, I understand the Cherokee Tribe has brought a lawsuit on this matter. Is that the way it should work? Should the trustee be forced to suit?

Chief **Mankiller**. No; it should not work that way. It really shouldn't work that way. We have spent a lot of money just litigating the issue of ownership, and then we've spent a lot of money litigating individual issues of trespass. Now we're having to sue the

Department of the Interior saying essentially that they are violating their trust responsibility.

No; I don't think that is the way things should work. There should be an easier way of doing this.

Chief **Roberts**. Mr. Anderson, I'd like to back up to the question that you asked a moment ago about frustration.

There is a tremendous amount of frustration upon our part, both with BIA and with Indian Health Service. That is why the Choctaw Tribe has contracted under Public Law 93-638 all the responsibilities of the BIA and Indian Health Service—all their operations except the trust responsibility.

Mr. **Anderson**. Because you think you can do a better job?

Chief **Roberts**. We have done a far better job in the last five years. We have done far better than what the BIA or the Indian Health Service have performed.

Mr. **Anderson**. And in this particular case you think you could have done a better job?

Chief **Roberts**. Sure. Far better.

Mr. **Anderson**. Mr. Chairman, I have no further questions.

Senator **DeConcini**. Senator McCain.

Senator **McCain**. No questions.

Senator **DeConcini**. Senator Nickles, do you have any questions?

Senator **Nickles**. Mr. Chairman, I want to ask one——

Governor **Anoatubby**. Can I make one final statement?

Senator **DeConcini**. Please go ahead.

Governor **Anoatubby**. Regarding the question on the frustration: gentlemen, it is beyond frustration. In fact, it makes me ill every time I think about it to have 96 miles of river land that belongs to the tribes, and we have no access. It is not only inappropriate, it is beyond frustration. It is embarrassing to us as tribal leaders. It makes me ill every time I think about it to have an asset that has belonged to us for this many years and not be able to do anything with it.

Senator **DeConcini**. Senator McCain.

Senator **McCain**. No questions.

Senator **DeConcini**. Senator Nickles.

Senator **Nickles**. Mr. Chairman, I want to thank you for conducting this hearing. I also want to thank our witnesses.

This has been going on since 1970, but there was some money requested from BIA for some surveys in 1987? Is that correct? And then maybe some money originally in 1973 or 1974?

Chief **Roberts**. In 1972 we got 2 years of funding out of 5 years of funding.

Senator **Nickles**. But out of that you only completed surveys on 700 acres out of 22,000?

Chief **Mankiller**. Yes.

Senator **Nickles**. They didn't really get much done?

Chief **Mankiller**. No.

Chief **Roberts**. Right.

Governor **Anoatubby**. Just about 1 mile of the 96 miles.

Senator **Nickles**. So out of the 22,000 acres, we still have approximately 21,000 that need to be done.

I'm just wondering, Chief Mankiller; your predecessor, Ross Swimmer, was in the Interior Department. Did he request this money from Congress, or——

Chief **Mankiller**. What little help we got was during the time when Mr. Swimmer was the Assistant Secretary. He could not personally be involved in it, but he arranged some meetings for us with both Interior officials from the BLM and BIA.

Senator **Nickles**. And he is 100 percent supportive of——

Chief **Mankiller**. Yes.

Senator **Nickles** [continuing]. Completing the survey work, as well?

Chief **Mankiller**. Without a doubt.

Senator **Nickles**. I don't remember a specific request in years past for $1.5 million appropriation to complete the work, but I will join with the chairman. I also happen to be on that appropriations committee and the Interior Subcommittee, and was with Senator Inouye when he toured the riverbed. We will work aggressively to see that we either get the funds as an add on, or maybe direct the BIA to spend the money to get it done. I think it is important that it be done.

We are talking about 22,000 acres; is that correct?

Chief **Mankiller**. Yes.

Senator **Nickles**. I don't have any idea—what would that land go for? Would it be $500 an acre, $400 an acre?

Chief **Roberts**. I think the testimony will appear here in just a minute that the 22,000 acres is valued at $177 million.

Senator **Nickles**. Say that again?

Chief **Roberts**. That was $177 million.

Senator **Nickles**. Are there a lot of minerals involved?——

Chief **Roberts**. Sand and gravel, oil and gas, coal.

Senator **Nickles**. So it could have very significant gas reserves as well?

Chief **Roberts**. Sure.

Senator **Nickles**. Is that correct?

Chief **Mankiller**. Yes.

Senator **Nickles**. And with those reserves, in addition, there would be royalties; is that correct?

Chief **Mankiller**. That's correct. Yes.

Senator **Nickles**. Thank you very much. We look forward to working with you on that and hopefully we can be successful soon.

You mentioned that you didn't want BLM to do the surveys, or you're afraid that it would take too long if they did the surveys?

Chief **Mankiller**. I think they are required by law to do that. If there is some way that we can bypass that or get a waiver or something to move that process forward faster, we would be very pleased. We're willing to contribute in-kind labor and really try to help. We want to help and expedite the process.

Senator **Nickles**. Are you afraid if BLM did it, it would take years?

Chief **Mankiller**. It wouldn't happen in my lifetime. [Laughter.]

Chief **Roberts**. Senator Nickles, in response to Senator DeConcini, the BLM also—we're only asking, at this point, $1.5 million. That is what we can go out on the open market and have it done for. BLM must have indirect costs of 20 percent, which we don't even get indirect costs for ourselves. That is the added cost of burden that the BLM would add to their time frame of lagging and slowness.

Senator **Nickles**. How many years would it take BLM to complete the surveys, in your estimate?

Chief **Mankiller**. I don't know.

Chief **Roberts**. I wouldn't attempt to guess.

Senator **Nickles**. If we appropriated $1.5 million, you don't think, unless we really put the pressure on them, that they would get it done in a couple of years?

Chief **Mankiller**. No. I think you'd have to have some language that states a time frame within which to complete the surveys.

Senator **Nickles**. That's a good suggestion. Thank you very much.

Chief **Mankiller**. You're welcome.

Governor **Anoatubby**. In regards to that, it might not be a bad idea to have someone from the committee or someone from Congress to act in an oversight role to see that it is taken care of.

Senator **DeConcini**. We will call it to their attention, I can assure you.

I want to thank you all for your testimony today, and also thank you for the support that you have given this committee. It has been a difficult task, and certainly we have come across some very sensitive subject matters here. It is most encouraging to have leaders such as yourselves understand what we're doing and give us the support that you have expressed on the record today. I am most appreciative of that.

Believe me, we will do what we can within this investigative committee to urge the appropriation and moving on this process. I can tell you that if you have Senator Inouye committed to do this, it will happen.

Thank you.

Chief **Mankiller**. Thank you.

Chief **Roberts**. Thank you, sir.

Governor **Anoatubby**. Thank you.

Senator **DeConcini**. The next witnesses will be Tina Jordan, attorney, Arkansas Riverbed Authority; Mark Fischer, president, Chaparral Energy, Oklahoma City; and William Foster, attorney, Cherokee Nation.

Would you all please come forward and raise your right hand?

[Witnesses sworn.]

Senator **DeConcini**. Mr. Anderson.

STATEMENT OF WILLIAM FOSTER, ATTORNEY, CHEROKEE NATION

Mr. **Anderson**. Mr. Foster, earlier we heard testimony from the three chiefs that millions of dollars have been lost due to the Government's failure to survey this land. Is that your understanding also?

Mr. **Foster**. Yes; it is. Our estimates are based upon what we see that has been lost both from the surface and from the subsurface. As Senator Nickles mentioned, there are also very valuable resources in the subsurface in terms of oil and gas.

Our estimate, in terms of the 22,000 acres that are available, is that we would expect that the tribe could generate money in excess of $1 million a year in terms of leasing it for farm land—very rich farmland. We have soybeans and hay and other crops that are not available for leasing or for farming by the tribes. So we see in excess of $1 million a year there being lost each year.

In addition to that, there are sand and gravel resources along the riverbed. Of course, that riverbed, like any other riverbed, is very rich in sand and gravel. Those have not been available, except in a few instances, to the tribes because of the survey not being available.

Mr. **Anderson**. And you've lost those every year——

Mr. **Foster**. Every year.

Mr. **Anderson** [continuing]. Since 1970; is that right?

Mr. **Foster**. That's correct. The survey that was mentioned before that was made and paid for by the Bureau of Indian Affairs right after 1970, after the Supreme Court decision, estimated that the value of the sand and gravel in the riverbed exceeded $20 million, itself. That was their estimate of it. We think that those resources are even more valuable today. There is a great demand for sand and gravel in that area, and big commercial operations are interested. We have had a few contracts, but it would be much improved and the value of those resources could be realized if we had the survey of the sand and gravel.

Mr. **Anderson**. How about oil and gas? How much has the Tribe lost in the past due to oil and gas losses? And how much could you get if you had the title today?

Mr. **Foster**. Here you're talking about more than just $1 million a year. You're talking about several million dollars a year. It could be more than $5 million a year.

There has been very serious drainage throughout that area—particularly in the richer area down along the Arkansas/Oklahoma border for about 20 miles in the Arcoma Basin, which is——

Mr. **Anderson**. What kind of an area is that? Is that a productive area?

Mr. **Foster**. It is a very productive area—one of the hottest areas in Oklahoma today. You've got some wells there that are of huge size. You've got some wells producing up to or beyond 50 million cubic feet a day.

Mr. **Anderson**. And the tribe is getting no revenue from that?

Mr. **Foster**. They're getting limited revenue from a few of the leases. Our problem has been, because of the drainage, we're being drained because of the lack of leasing that has gone on until the last couple of months. Within the last 6 months there has been a flurry of leases—we think we know why in part. There has been more attention given. But there has been a flurry of preleases given in the last 6 months, but in the period of the previous 8 years there were only eight leases that they now have that are active that are meaningful that were given during the previous 8 years.

Mr. **Anderson**. So there are lands that could have been leased even on clear Indian title that have not been protected?

Mr. **Foster**. Absolutely correct. There are lease areas that we think could be leased tomorrow morning and are not leased, and therefore, if you have a section there and it is not leased, and the adjoining sections to the north, south, or east are being produced, they are being produced from beneath you. You are losing something, and you may be losing a lot.

Mr. **Anderson**. Do you have any idea why BIA—and I assume BIA is the entity——

Mr. **Foster**. BIA, under the statutes and regulations, takes the initiative on all leases. They are the ones who advertise the leases, they put them out for public offering. As a matter of fact, they're not doing it correctly, but at least from time to time—we hate to criticize them when they finally do something, but even when they do it, they do it incorrectly. They do not get, as they are required to do under the law in the regulations, prior approval from the tribe. They are supposed to do that before they put them out, but they don't do that.

But they put them out, they get competitive bids, they come back and then offer them to the tribes. A problem there has been that they have never, in the history—although they are required to do so under the regulations—provided the tribe with an independent appraisal of the value of the leases being offered. They have never done that. They bring them to the tribe and say, "Would you believe this figure?" And the tribes there are not making much money on the leases anyway, so when they finally get one they are inclined to go along. But they don't get any independent appraisal of that.

Mr. **Anderson**. If the tribes lost money due to these past damages from drainage, is there any way for them to ever collect that money, or is that gone forever?

Mr. **Foster**. The problem with that—yes, you can try to bring some lawsuits. The problem with that is that you've got your acreage there—your part of 600 acres. You've got your acreage there. You've got production going around on adjoining sections that are producing from 2, 5, and sometimes 10 years, and then you try to bring a suit and prove your damages. Well, it is gone in terms of drainage.

What you're supposed to do when there is drainage is drill a well. Well, if you can't drill a well because you don't have it leased, which they don't have it leased and can't do it themselves, then the only thing you can do is try to get someone else to lease it and drill a well. You can't drill a well. You stand there and get drained.

In other situations it has been leased, and then they go and find out, like Mr. Walker will tell you today with Stevens Company, he's got a Federal lease by the BIA and he's sitting there and can't drill. He's got a lease that obligates him to drill on that land because it is being drained—he thinks it is being drained. He can't drill. He can't drill because you've got trespassers on there and the Federal Government won't stand behind the lease. It doesn't stand behind the lease because they won't take them in to court and prove it because they don't have the survey necessary to go into court and let him drill.

Mr. **Anderson**. Mr. Foster, is it fair to say here that the Government, as the trustee of the tribes here, has just failed miserably?

Mr. **Foster**. Terribly. They have been sitting there for 20 years watching this land be drained. Even if we had leases, there is other acreage nearby that is draining because there are larger wells and you ought to be drilling. You ought to have two wells, not one, to offset that drilling. They haven't done that either. It has been going on for all these years, and a big part of the problem has been the failure to lease it. We're not going to be able to lease it for anything like it should be leased for until we get a survey so we can prove it so those that have a lease can go into court and prove it if they have to in order to drill. We're just not going to be able to get the money for it.

STATEMENT OF TINA JORDAN, ATTORNEY, ARKANSAS RIVERBED AUTHORITY, TAHLEQUAH, OK

Mr. ANDERSON. Ms. Jordan, you are the executive director of the Arkansas Riverbed Authority; is that right?

Ms. JORDAN. That's correct, sir.

Mr. ANDERSON. And that is a group that is formed from the three tribes to represent the tribes' interest on the riverbed; is that correct?

Ms. JORDAN. Yes, sir.

Mr. ANDERSON. Now, is it your experience also that there are alleged trespassers here who are taking revenues from the tribe?

Ms. JORDAN. Sir, we know there are trespassers. We see them on a daily basis along the 96 miles of the river. We go out and physically observe their trespass activities.

Mr. ANDERSON. Do they live there? Are they occasional trespassers?

Ms. JORDAN. A great number of them live on property adjacent to the property that we claim ownership to. They continue their farming operations off of their property onto tribal property, as they have done for many years. At least we know for the last 20 years that many of them have been there on that property or their families have been there operating farming operations.

Many of them have leased out the property for oil and gas purposes because they believe that they own the property. We have visited with them on numerous occasions, brought to their attention our claim of ownership, as a result of the 1970 lawsuit decision, and they have basically—a great number of them have told us, "Until you establish your boundary lines, we will continue to operate as we have in the past." So without a survey, we can't claim ownership.

Senator DECONCINI. Excuse me, Mr. Anderson.

When you say they are on their land, you believe them to be that, but you can't prove it.

Ms. JORDAN. Not without——

Senator DECONCINI. Not without a survey.

Ms. JORDAN [continuing]. An adequate establishment of the boundary lines.

Senator DECONCINI. And your being an attorney, you cannot sue based on that Supreme Court decision? Are you satisfied that, on behalf of the beneficiaries, you couldn't bring a suit against those people to quiet title based on that Supreme Court decision?

Ms. JORDAN. We could sue, but without a survey we have no evidence to back up our lawsuit. We have to have surveys. The normal process would be that you would obtain a survey and then attempt to quiet the title based on your survey.

Mr. ANDERSON. In terms of economic losses here, how many millions of dollars would be lost due to alfalfa or agricultural types of uses there?

Ms. JORDAN. We have approximately 15,000 acres that, if developed properly, would be fertile farmland. If we were able to develop that, either on the tribe's behalf or the tribe leasing it to individuals that could develop that, I would see in the millions of dollars that we would be able to obtain for the benefit of the tribes and their members.

Mr. ANDERSON. And is it a fact that some of this land is more fertile because it is the old riverbed area, which is soil that is more fertile for——

Ms. JORDAN. Yes, sir; when the corps project went in, basically what they did was straighten out the river so that barges could use it to move their materials up and down the river. That exposed a great amount of farmland—approximately 15,000 acres—as a result of that project.

Because of the deposits that were left there because it had been riverbed property, it is at least twice as fertile, if not three times as fertile, as property that is adjacent to it.

Mr. ANDERSON. And there are other alleged trespassers who are government entities that you have had problems with?

Ms. JORDAN. Yes, sir; in the past we have had local government units that have removed sand and gravel from particular sites that we have ownership of.

Mr. ANDERSON. How much did that run into in terms of money?

Ms. JORDAN. Well, in 1976, which was the latest appraisal we have on the whole 96 miles, the sand and gravel was appraised at $32 million. I would assume in the last 13 years that that has increased in value, as sand and gravel have gone up on the open market.

Mr. ANDERSON. And that sand and gravel has been lost for this number of years?

Ms. JORDAN. We have been unable to use it because we have no established boundary lines.

Mr. ANDERSON. Is there any way to get—have any of the parties that are using sand and gravel ever stopped if you told them you think it is Indian title?

Ms. JORDAN. If we can catch them on the property, we have contacted the local government units, and they have been cooperative in our effort in ceasing their removal. Now, your private owners won't stop, but your government entities normally will let you direct them to a site that is under lease where we do receive some revenues.

Mr. ANDERSON. How about the Army Corps of Engineers? They are in this area also?

Ms. JORDAN. We have particular instances—documented in our files—where the corps, over a number of years, has received money for either easements or sand and gravel operations. Once we made those individuals that were dealing with the corps aware of the fact that we believe we own the property, then they have dealt with us.

Mr. **Anderson**. Have you ever had instances where farmers will try to do business with the tribe with the tribes' revenues?

Ms. **Jordan**. Just last summer while out in the field I actually went with my land person out in the field to observe a bailing operation down close to the Arkansas/Oklahoma line. There were 15,000 bales of alfalfa on the ground and the man tried to sell us our own hay for $3 a bale.

Mr. **Anderson**. Did you buy that hay?

Ms. **Jordan**. No, sir.

Mr. **Anderson**. Now, what is the attitude of the people who are on the land? When you have contacted them, are they understanding of the tribe's position, or do they rightfully feel they are there and should stay?

Ms. **Jordan**. The private landowners are truly what we might call an aggressive trespasser to the point of being violent. I think you have heard an example from Governor Anoatubby regarding a man that has a commercial resale operation of auto parts down along the Arkansas line. On paper this commercial entity owns approximately 2 acres. Physically, they are exceeding that acreage at least 10 times that, and he is a very aggressive trespasser, to the point of potential violence.

Mr. **Anderson**. What is on the land that he is using?

Ms. **Jordan**. It is a salvage yard.

Mr. **Anderson**. So there are junk cars out there on the land?

Ms. **Jordan**. Yes, sir, and of the 96 miles, it has probably the greatest economic potential for the three tribes. I believe you have heard Chief Roberts relate to you that if they are able to obtain that site through the survey process and through litigation, they will be able, on a yearly basis, to make anything from three quarters of a million dollars to $1 million per year.

Mr. **Anderson**. Is that the person they refer to as having "shotgun title"?

Ms. **Jordan**. Yes, sir.

Mr. **Anderson**. Why do they call it "shotgun title"?

Ms. **Jordan**. Because of the use of guns.

STATEMENT OF MARK FISCHER, PRESIDENT, CHAPARRAL ENERGY, INC., OKLAHOMA CITY, OK

Mr. **Anderson**. Mr. Fischer, you are not with the tribe; is that correct?

Mr. **Fischer**. That is correct.

Mr. **Anderson**. And is your business the oil and gas business?

Mr. **Fischer**. That's correct.

Mr. **Anderson**. Could you give us briefly your background in the oil and gas business? How long have you been in it?

Mr. **Fischer**. I graduated from Texas A&M University in 1972 and went to work for Exxon as a production engineer, reservoir engineer and production superintendent out in the west Texas area.

In 1977, I moved and went to work for Texas Oil & Gas Corp. where I was moved to Oklahoma as a drilling and production manager. I oversaw the operations particularly in the eastern Oklahoma area where we drilled approximately 70 to 90 wells. We were one of the largest drillers in the country at that point in time.

In 1980, I went to work for Donald C. Slawson Oil Producers as their operations manager, again doing an awful lot of drilling in the eastern Oklahoma area.

In roughly November 1988 I started my own company, Chaparral Energy, Inc., and, in addition to that, I am an independent consulting engineer.

Mr. ANDERSON. So you have got at least 15 years in the oil and gas business; is that right?

Mr. FISCHER. Yes, sir; about 17.

Mr. ANDERSON. And, based on your experience, what would you say the production is of the wells in eastern Oklahoma? Is that a good area?

Mr. FISCHER. It is a very good area at this point in time. Particulary the first 15 or 20 miles from the Arkansas line westward, it is very, very productive of gas. I would also say there is a lot of drilling—in-field drilling—going on in the area. There are also a few new discoveries in the Arbuckle, which make it extremely attractive.

Mr. ANDERSON. In fact, it is one of the hottest areas in the State; is that right?

Mr. FISCHER. That is correct.

Mr. ANDERSON. Now, the committee has provided you with the leases for the Arkansas Riverbed area; is that right?

Mr. FISCHER. That is correct.

Mr. ANDERSON. And you have had an opportunity to look at those?

Mr. FISCHER. Yes; I have.

Mr. ANDERSON. Basically what you looked at was what was leased in the area and if there is any drainage going on in the area? Do you have a judgment on that?

Mr. FISCHER. Yes; I do. Mr. Foster indicated earlier that the leasing activity over the last 6 months to 1 year has been up dramatically, but prior to that point in time I think there were only four leases taken in the previous 8 years.

As far as drainage, one of the main problems is the open sections that have not been leased. For whatever reason, I'm not sure, but there are some of those sections that are very valuable.

Mr. ANDERSON. Is it your understanding that BIA's responsibility is to lease these properties?

Mr. FISCHER. Yes; it is.

Mr. ANDERSON. And these properties are not in dispute in title in a lot of cases; is that right?

Mr. FISCHER. These particular leases that I'm talking about could all be in dispute. There are others that are under lease that are also in dispute, but some of these that are unleased would also be disputed.

Mr. ANDERSON. And based on your understanding of the hot market there, what would you say the tribe has lost in terms of oil and gas revenues for that area?

Mr. FISCHER. Well, you'd almost have to do a full, detailed evaluation of it. But it would be—I would say somewhere in the neighborhood of $300,000 to $400,000 a year. It could be as high as a couple of million dollars a year.

Mr. **Anderson**. Did you look at the specific wells to see whether, in your understanding, there was drainage going on of particular sites that were hot producing properties?

Mr. **Fischer**. Yes. There is one particular area that comes to mind where there was a section that has no Indian acreage under it that has recovered somewhere in the neighborhood of 10 BCF gas. This section is surrounded by six sections, all of which have Indian acreage, and the combined total of which have only recovered 5 BCF.

Mr. **Anderson**. How much would 10 BCFs be worth to the tribe?

Mr. **Fischer**. Of course, that is a function of the gas prices, but somewhere in the neighborhood of $15 million. In any case, going ahead with that, if in-field drilling had been pursued in a timely manner, I would say that maybe an additional 5 to 7 BCF could have been recovered for the Indians, with a total value of somewhere around $7 to $10 million.

Mr. **Anderson**. Based on your review of the leases and the activity that has gone on, as an oil man, Is that the way you would have leased the properties in the Arkansas Riverbed?

Mr. **Fischer**. Definitely not. I think it has definitely not been monitored properly and has not been pursued aggressively to get leases on the unleased areas.

Mr. **Anderson**. And again from your perspective from the oil business, if you were to look at Indian properties where there is a title dispute, what kind of effect would that have on your ability to go in and bid on a property like that?

Mr. **Fischer**. Given that it is a sufficient quantity of acreage, which it does appear that there is in most cases, it would be very detrimental. You would not want to risk spending $500,000 to $1 million drilling a well and then find that you end up not having a well because of a title problem.

Mr. **Anderson**. Mr. Chairman, I have no further questions.

Senator **DeConcini**. Mr. Ballen, do you have any questions of any of the witnesses?

Mr. **Ballen**. Yes, sir.

Mr. Fischer, you said you have been in the oil business for almost 20 years now; is that right?

Mr. **Fischer**. Yes, sir. For 17 years.

Mr. **Ballen**. And with Exxon, Texas Oil & Gas, and a number of major producers; is that correct?

Mr. **Fischer**. Yes.

Mr. **Ballen**. And now you have your own energy company?

Mr. **Fischer**. Yes, sir.

Mr. **Ballen**. Are you aware, sir, of any purchaser oil theft?

Mr. **Fischer**. Yes, sir. There are a number of instances—in fact, many, many, many instances—where purchasers are buying crude oil, and at the time of moving of the oil they are skimming anywhere from one to three inches either from the top or bottom gauges.

Mr. **Ballen**. How widespread is this practice? You're active in Oklahoma and on Indian land?

Mr. **Fischer**. Yes, sir.

Mr. **Ballen**. Have been through your 17 years?

Mr. **Fischer**. Oklahoma and west Texas.

Mr. Ballen. All right, sir. How pervasive is this practice? The committee had two days of hearings last week on it. How pervasive is this practice of the purchaser skimming a certain amount off the top of the oil?

Mr. Fischer. It is very, very common. In fact, it is very common.

Mr. Ballen. Is this through misgauging, essentially?

Mr. Fischer. Is it what?

Mr. Ballen. Is it through the gaugers mismeasuring that the theft occurs?

Mr. Fischer. Yes, it is. What they do is actually go out and gauge the tank. They will come up with an opening gauge, and this will differ from the actual gauge that is in the tank.

Mr. Ballen. And you say how many companies are doing this? How many of the major purchasers of crude oil in your experience are doing this? Have you specifically caught some of these companies doing it?

Mr. Fischer. Yes, I have.

Mr. Ballen. In fact, what is the adage in the oil patch?

Mr. Fischer. Well, it generally is that if a gauger can't steal his worth in oil, then he's not much of a gauger.

Mr. Ballen. Sir, has this ever reached any companies that you have—in fact, since they have been stealing over a period of time that you have actually kicked them off your company's land?

Mr. Fischer. Yes, sir, we have.

Mr. Ballen. Who and when?

Mr. Fischer. The most prevalent one was Koch Oil Co. About 6 years ago they were the predominant purchaser of crude oil from properties of Slawson Oil Co. We got very dissatisfied. We were finding that there were anywhere from 2 to 6 inches being skimmed off of every tank. It was very costly to us. We tried to work the problem out with them without success, and we finally changed purchasers.

Mr. Ballen. They were one of the largest purchasers in your experience?

Mr. Fischer. Yes, they are.

Mr. Ballen. You say other companies are doing this, as well, in your experience?

Mr. Fischer. They are. It is very widespread. There are a number of other companies that are doing it.

Mr. Ballen. Is there any distinction in your experience made between Indian, Federal, and non-Indian land? Or is this widespread throughout?

Mr. Fischer. It is widespread throughout. I don't think most of the purchasers, in many cases, even know which leases are Federal leases or which sections have Federal leases under them.

Mr. Ballen. One of the suggestions made to the committee last week is that we ought to think about putting a Federal certification on the run tickets so that it is a crime if you misstate and mismeasure the oil. What affect, if any, do you think that would have?

Mr. Fischer. I think it would probably help. Anything that you could do would be a help. I think it is a situation that, if people can see that they'll be going to jail if they do misrepresent the opening and closing gauges, then it should be beneficial.

Mr. Ballen. Thank you, Mr. Chairman.

Senator DECONCINI. Senator McCain, did you have any questions?

Senator MCCAIN. No, sir.

Senator DECONCINI. Senator Daschle.

Senator DASCHLE. None at this time.

Senator DECONCINI. Senator Nickles.

Senator NICKLES. No questions.

Senator DECONCINI. Thank you very much for your testimony.

Mr. FISCHER. Thank you.

Senator DECONCINI. Mr. Walker, would you please come forward and raise your right hand?

[Witness sworn.]

Senator DECONCINI. Mr. Anderson.

STATEMENT OF WILLIAM WALKER, STEPHENS PRODUCTION COMPANY, FORT SMITH, AR

Mr. ANDERSON. Mr. Walker, what is your present business?

Mr. WALKER. I am the vice president of Stephens Production Co., an independent oil and gas producer located in Fort Smith, AR.

Mr. ANDERSON. And you do oil and gas production and drilling in Oklahoma?

Mr. WALKER. Primarily in the Arkoma Basin, which is a dry natural gas province.

Mr. ANDERSON. And you would agree with the other testimony that it is a hot property in terms of oil and gas production?

Mr. WALKER. We like to think so right now. Yes.

Mr. ANDERSON. Your company has quite a few wells in that area; is that right?

Mr. WALKER. We have an interest in approximately 2,000 wells in the area.

Mr. ANDERSON. Do you occasionally enter into leases with the BIA on tribal property?

Mr. WALKER. Yes; we do.

Mr. ANDERSON. Sir, could you tell the committee what happened when you began to enter into some leases on the tribal property in the last few years?

Mr. WALKER. We have one particular instance where we have a lease with BIA that we have drilled several gas wells on the property. We have identified another prospect based on recent offset drilling, and we are ready to go and drill this prospect; however, it falls on what we believe to be Indian surface where there is a trespass situation to the extent where the trespasser has leased out the surface for agricultural purposes.

Mr. ANDERSON. And, sir, that lease was approved by the BIA?

Mr. WALKER. Yes.

Mr. ANDERSON. What happened when you tried to go on the property and use it?

Mr. WALKER. The first thing you do when you go drill a well after you have identified it is to go out and stake the site, and we survey in a stake where we are actually going to drill the hole. It was in agricultural land, and we went out a week later after the surveyor said they had staked it and the stake had been plowed up.

Mr. ANDERSON. What does that do to your assessment of bringing in equipment to the area when you think there is a problem on the land?

Mr. WALKER. Well, your drill site tract is your most important tract in the unit, and if there are any title problems, be it surface or subsurface, with the title, most operators will not take a risk to put the equipment on that particular tract of land.

Mr. ANDERSON. Is it because you are afraid you might lose a lot of equipment or it is going to be useful and valuable?

Mr. WALKER. Well, that is your only source of getting revenue out is that particular well head. So if somebody else can hold you up on entering that tract of land, then you can't produce the gas.

Mr. ANDERSON. So after you got a BIA-approved lease you went on the land and you found out that your stakes were pulled up. What happened next? Did you contact BIA about this?

Mr. WALKER. Yes, we did. We contacted BIA out——

Mr. ANDERSON. When was that, sir?

Mr. WALKER. It was approximately 1 year ago we identified this prospect and entered into conversation with the BIA.

Mr. ANDERSON. And what did they tell you about protecting your rights to drill there?

Mr. WALKER. We asked for direction, basically, on how to proceed at this point, and explained to them the problem. They were familiar with the trespass situations up and down the riverbed, and indicated that surveys would be forthcoming.

Mr. ANDERSON. Has that area been surveyed since that time?

Mr. WALKER. To my knowledge, no.

Mr. ANDERSON. Have you made contact with BIA and asked them to survey the area?

Mr. WALKER. Yes, we have.

Mr. ANDERSON. What have they told you?

Mr. WALKER. That we're going to get around to surveying it eventually.

Mr. ANDERSON. What happens to your property in the meantime?

Mr. WALKER. Well, what we call "imminent drainage." We believe that there will be drainage occurring from the offsetting sections as they get hooked up, as well as existing wells that are currently hooked up and producing gas.

Mr. ANDERSON. If you were to begin draining in that area, would some of the royalties go to Indian landowners?

Mr. WALKER. Very definitely.

Mr. ANDERSON. And without that ability to go in and drill, they're going to lose money; isn't that right?

Mr. WALKER. Not only the Indians, but also there is private, patented ownership in this section, and the individuals, as well as the Indians, would lose royalty.

Mr. ANDERSON. Does it surprise you in any way that the Government would approve a lease and allow you to sign it and go on the property when it is not protected?

Mr. WALKER. This problem has existed for a number of years, and I really don't know the basis of the problem as far as what has gone on.

Mr. ANDERSON. Is that going to affect in any way your ability to bid or your thinking on other Indian properties on the riverbed?

Mr. **Walker**. Well, if you can't get access to the drill site, it would certainly—you'd think twice about buying an oil and gas lease.

Mr. **Anderson**. Mr. Chairman, I have no further questions.

Senator **DeConcini**. I don't have any questions either on this subject matter. I think you have covered it very well and laid the record we want to lay here.

Senator Nickles, do you have any questions?

Senator **Nickles**. No.

Senator **DeConcini**. Thank you very much, Mr. Walker.

Next is Tim Vollmann. Mr. Vollmann, I remind you that you are under oath, having already taken the oath in your previous testimony.

Mr. Anderson.

STATEMENT OF TIM VOLLMANN, SOUTHWEST REGIONAL SOLICITOR, DEPARTMENT OF THE INTERIOR, TULSA, OK

Mr. **Anderson**. Mr. Vollmann, does it surprise you in any way that the area director of BIA would say the Government has failed in its trust responsibility in this area?

Mr. **Vollmann**. That is the subject of a suit that the Cherokee Nation has filed against the Government. I'm not authorized to make any admissions regarding the governmental liability in that litigation.

Mr. **Anderson**. In terms of the damages out there, would you say the tribe has suffered a loss of revenues due to the lack of ability to protect their resources?

Mr. **Vollmann**. I'm really reluctant to answer that. My job has been to identify the lands that are the subject of the tribal claims and to bring these into court as soon as possible. I have been working with the Arkansas Riverbed Authority and the tribal leaders and the BIA and the BLM, and we want to identify the tracts that are our best cases and bring those suits to court so the tribe can get the value from their resources.

Mr. **Anderson**. Sir, you would see the survey as being very valuable in terms of bringing some action on behalf of the tribe; is that right?

Mr. **Vollmann**. It is important. It is not the only step, but it is an important step.

Mr. **Anderson**. Is it a necessary and essential step in that process?

Mr. **Vollmann**. It is. It is not indispensible to the filing of the suit initially, but we have to be ready to prove up the entire claim, and at some point in time we are going to need the survey. Yes.

Senator **DeConcini**. Excuse me, Mr. Anderson.

Mr. Vollmann, you testified 2 days ago—and I don't have the record here, but it is not in relation particularly to this pending case, that you felt that—I think you said this, and please correct me—in your opinion, the Federal Government had not met its trust responsibilities.

Mr. **Vollmann**. I don't think I made that legal conclusion. I believe what I said is we can do better, and I plan on making sure we can do better.

Senator DECONCINI. I don't have that, but that was my recollection. The reason I want to ask you that question is that testimony that we have previously had here today indicated that on the Arkansas Riverbed there could be as many as 1,000 different landowners involved who might be trespassing and would be required to be named defendants in a quiet title suit if, in fact, the survey substantiated that. If that were true, or if it were anywhere between 600 or 700 and 1,000, what kind of additional resources would you estimate that you would need to proceed with such a quiet title suit?

Mr. VOLLMANN. The manner in which we are proceeding is that we are working with the tribe in identifying those tracts that best lend themselves to the bringing of a suit. I was in Santa Fe 2 weeks ago meeting with the Cadastral Survey Team that supervises the survey work, and I got their commitment to cooperate with us in the prioritizing of this work to get it done as quickly as possible.

To answer your question, I don't have a specific number of the number of attorneys I need. At this point we are still going through the data that was developed in the studies that were federally funded and done in the 1970's identifying the tribal resources. I have an attorney working virtually full time on that.

Now, Ms. Jordan is working very closely with us on that. We still need abstracts of all the record mineral title holders who would be named as defendants in the case, and that is an additional substantial expense.

Whether it is done under contract with the Arkansas Riverbed Authority or done by my office, it is a substantial expense.

Senator DECONCINI. If you had 1,000 additional quiet title suits where you had the survey to proceed against them, what additional resources would it take in your office to attempt to bring quiet title suits in a timely fashion?

Mr. VOLLMANN. I think the 1,000 number is misleading, Senator. That would be the—I think that that is the Tribe's estimate of the number of claimants in the area. When we file a suit, we will file a suit that is tract specific, and we will name in each suit everyone who has any record title claim based on our work in the abstract.

Senator DECONCINI. But one suit could very likely include dozens or hundreds of defendants in a quiet title suit?

Mr. VOLLMANN. I can easily estimate that. And one suit is a very time-consuming process.

These riverbed claims are very complex claims. It is not unusual to see them in litigation for years.

Senator DECONCINI. Do you have any estimate as to what additional resources you would need if, in fact, you had a survey of the 96 miles of the riverbed that we're talking about?

Mr. VOLLMANN. No, because the way we intend to proceed is by identifying with the tribes those tracts that are most valuable and most susceptible to getting our claims established, with the expectation that we would be able to settle many of the claims on the riverbed on the basis of the precedent that we have developed. So I don't know that we're going——

Senator DECONCINI. You would not bring a suit against all of them at one time even if you had a survey?

Mr. **Vollmann**. That's right. We wouldn't do that. Every bend in the river involves different factual issues and different defendants. That would not be a wise way of proceeding.

Senator **DeConcini**. And I appreciate that explanation. If that is the case, if you succeed in the suits that you are working on now, even without a survey, do you anticipate that litigating those cases will help you with the other Indians claim that are within that 96 miles of riverbed? Or do you feel a survey will still be necessary for the whole thing?

Mr. **Vollmann**. The survey is necessary for most of the riverbed. About one fourth of the 96 miles is completely submerged under reservoirs, and I don't think anyone is asking that that area be surveyed.

Senator **DeConcini**. One-quarter of that?

Mr. **Vollmann**. Yes.

Senator **DeConcini**. Thank you.

Mr. **Anderson**. Mr. Vollmann, in your review of the records of this case since the 1980's, do you have any explanation of why BIA hasn't requested BLM to do the survey?

Mr. **Vollmann**. No; I really don't.

Mr. **Anderson**. Is it your understanding that BLM first received the request from BIA in 1987?

Mr. **Vollmann**. My records indicate that there may have been some discussions with BLM as early as 1986, but not earlier.

Mr. **Anderson**. Sir, does the United States have a fiduciary duty to remove trespassers from Indian land?

Mr. **Vollmann**. My Justice Department lawyer is sitting behind me. I don't have a problem with that proposition. Whether it is enforceable in court is another matter.

Mr. **Anderson**. But you'd recognize at least that where there are trespassers on tribal land, as the trustee the trustee would have the responsibility to do that?

Mr. **Vollmann**. We treat the matter of trespassers on Indian lands very seriously. As I mentioned in my testimony on Tuesday, we give priority to that work, and we're dealing with any number of trespass situations on Indian lands in Oklahoma right now.

Mr. **Anderson**. I take it you don't feel the situation is ideal when the beneficiary of the trust sues the Government to enforce that trust responsibility?

Mr. **Vollmann**. That would suggest a breakdown. Yes.

Mr. **Anderson**. I have no further questions.

Senator **DeConcini**. Thank you, Mr. Vollman.

Senator Nickles, do you have any questions?

Senator **Nickles**. Just to kind of follow up, Mr. Chairman, on your comment.

You mentioned the 96 miles. What percentage of that was under the reservoir?

Mr. **Vollmann**. I've been told about one fourth.

Senator **Nickles**. One-fourth of it. And you would be supportive of Congress trying to expedite BLM completing these surveys if we give them $1.5 million to do so? Do you think that would help resolve some of these claims?

Mr. **Vollmann**. I feel I have a commitment from BLM right now to do the work that we need to do. If I were given the survey information for the entire river today, I wouldn't be able to move any faster than I have on the basis of the work we're doing right now.

Clearly the work needs to be done, but in terms of timing I really don't have any—I can't give you an informed estimate at this time. We've really only been actively working on these claims since approximately February. We met with the Arkansas Riverbed Authority in March, and we've been meeting with Ms. Jordan and working very actively on it since that time.

Senator Nickles. Well at the pace that you're going now, how long will it take to resolve those possible 1,000 claims?

Mr. Vollmann. I have no doubt that it will take years based on previous experience.

Senator Nickles. Are you talking about 2 or 3 years or are you talking about 20 years?

Mr. Vollmann. It could be 20.

Senator Nickles. If Congress gave you the survey data, would that be expedited?

Mr. Vollmann. Certainly we can't wait 20 years for the survey data. Sooner rather than later is better. Whether it is necessarily cost efficient in terms of having it all this year or spread out over a couple of years, I really am not sufficiently informed to give you a——

Senator Nickles. I think a lot of us think that 20 years is far too long and want to see rightful ownership restored.

Mr. Vollmann. Yes.

Senator Nickles. Would some increased assistance to your office help expedite the case load? If you have the survey data are you going to be able to move more rapidly?

Mr. Vollmann. I can't say no.

Senator Nickles. I'm concerned. I think that anyone familiar with our State is familiar with Arkoma Basin and the value of that property. Certainly rightful owners should be beneficiary of those minerals and royalties, etc. So I think if this is delayed there are some real inequities to a lot of people. So we need to move as rapidly as possible. But I don't get much of a feel that there is that sense of urgency in your office; is that correct?

Mr. Vollmann. No. I would disagree with that. I have an attorney working virtually full time on it right now. I have eight staff attorneys. We are handling Indian trespass claims, Indian oil and gas leases, Fish and Wildlife Service forfeitures, a wide variety of legal issues affecting the Department throughout the States of Oklahoma and Texas out of my office in Tulsa. I have given the Arkansas Riverbed matter very high priority in that. I am not about to set aside other Indian matters for purposes of addressing the Arkansas Riverbed.

I'm just not prepared to tell you what my needs are at this time because we have been working on it for such a short time and are trying to get the lay of the land in terms of what all is going to be involved in pursuing these cases. We have an enormous body of studies that have been done—I believe about $2 million was appropriated in the 1970's for a resource inventory of the tribal lands in the Arkansas Riverbed, and we will be relying on a lot of that data in developing these claims.

Meanwhile, the title work that Ms. Jordan is doing is tremendously complex and we're trying to get a handle on this and familiarize ourself with the applicable law. I believe we're making progress. This is an enormous task.

On the other hand, what I've told the tribes is that I'd like to think we can get the first suit filed here in the coming months.

Senator NICKLES. Would you keep us informed and maybe give us an evaluation of what your needs would be? If you need some assistance, either from higher up in the Interior Department—some of us would be happy to talk to the Secretary and see if we can't make sure that the necessary resources are allocated so an expeditious resolution of these pending cases can be completed. I'm not going to be satisfied—and I don't know that anybody else is on this panel or others—if this matter is prolonged and procrastinated as far as being left in limbo. It needs to be resolved as rapidly as possible.

Mr. VOLLMANN. Nor would I be satisfied. I'd be happy to give you periodic reports on our progress.

Senator NICKLES. I appreciate that.

Mr. Chairman, thank you.

Senator DECONCINI. Thank you, Senator Nickles.

Mr. Vollmann, are you under any direction from OMB or anybody else not to give us answers as to what your estimate would be to clear the legal title for the area?

Mr. VOLLMANN. No, I'm not under any directions. I really just can't give you an informed estimate.

Senator DECONCINI. Well, Mr. Vollmann, you've been a solicitor and you're operating two offices, and you have one lawyer assigned full-time to the Arkansas Riverbed, and you say you can't afford and will not—and I don't criticize you for that—take lawyers off other Indian claims to put them on there. What I want to know is: if you had the surveys, how many lawyers would it take for you to commence the legal actions to straighten up and quiet title to the Arkansas Riverbed? Would it take 2 more lawyers, 10 more, 20 more, 100 more? Can you please give me an estimate?

Mr. VOLLMANN. There is no question in my mind that if I had five more lawyers devoted full time to this that we could move this much faster.

Senator MCCAIN. Mr. Chairman, if he had 100 more it would never get done. [Laughter.]

Senator DECONCINI. So with five more lawyers devoted to it, if you had the survey, you would obviously be at your maximum capabilities then?

Mr. VOLLMANN. I think that that probably would be a wasted effort.

Senator DECONCINI. It would be wasted effort?

Mr. VOLLMANN. Over five. I think a team of five or six lawyers could do this.

Senator DECONCINI. What other personnel would you need besides that?

Mr. VOLLMANN. Well, of course there would have to be support staff.

Senator DECONCINI. Anything else? Do you need more physical space? Would you have to have——

Mr. VOLLMANN. If I hired five lawyers I would.

Senator DECONCINI. You would have to have more physical space. Would you need more automobiles and transportation and all those administrative costs?

Mr. VOLLMANN. There would be some administrative costs.

Senator DECONCINI. Mr. Vollmann, would you do me a big favor? Would you go back to your office and submit to this committee what five lawyers, support staff, and new space and whatever it is that you estimate—and I realize it would be an estimate—the cost would be on a yearly basis to increase your office by that much in order to move in the direction of these particular cases? Do you have that capability?

Mr. VOLLMANN. Yes, I have that capability.

Senator DECONCINI. Would you please do that for us?

Mr. VOLLMANN. Of course.

Senator DECONCINI. Is 2 weeks enough time to———

Mr. VOLLMANN. No problem.

[Information appears in appendix.]

Senator DECONCINI. Now, the other question I wanted to ask you: you talked about a $2 million study or information that had been put together that you are working off of now?

Mr. VOLLMANN. Yes.

Senator DECONCINI. What is that? Can you explain to me what that———

Mr. VOLLMANN. Yes. I believe Chief Mankiller's statement referred to it. Between 1973 and 1977, approximately $440,000 was appropriated per year to the BIA to contract for a resource inventory.

Senator DECONCINI. Resource inventory?

Mr. VOLLMANN. It was a resource inventory and appraisal. It was the basis for the $177 million figure that Chief Roberts referred to.

Senator DECONCINI. Thank you, Mr. Vollmann.

Senator McCain.

Senator MCCAIN. Mr. Vollmann, in your opinion, how could this problem occur for so long without something being done?

Mr. VOLLMANN. I have looked through the records of the BIA on the history of this matter since the 1970 Supreme Court decision, and during the 1970's I think the lack of a survey—and I stand corrected by the tribal leaders who have been involved in this, and this is only from my observation of the records—during the 1970's it appeared to be the tribal strategy to seek to lease or sell the riverbed resources back to the United States. That was the primary purpose of the $2 million study. There were approximately six bills introduced between 1976 and 1979 which would have compensated the tribe or authorized leasing by the Corps of Engineers of the riverbed lands.

So I believe the tribal strategy of that time was not to oust trespassers, but was to view the United States in the person of the Corps of Engineers as the primary trespasser, and to be compensated by the United States.

When that strategy was unsuccessful in the Congress toward the end of the 1970's, the strategy changed somewhat. The tribes were successful in getting a special jurisdictional bill passed in 1981 or 1982 which authorized this suit against the United States which went all the way to the U.S. Supreme Court in 1987 and is now still pending in the U.S. Court of Appeals. That is still part of the original strategy to hold the Federal Government accountable for the McClellan-Kerr Navigation System on the Arkansas River and the view that the United States was, I suppose, the biggest trespasser on the tribal land.

However, in the early 1980's, based on the record that I viewed, there began to be a concern regarding the third-party trespassers on the land, and the BIA sent demand letters to any number of persons and entities who were in the riverbed area and was successful in negotiating easements and rights of way and leases as to some, but certainly not all, of the land.

From what I can see, this really became a concern as a trespass matter only during the past decade. I can't explain the delays beyond that.

Senator McCain. And because of that, in your view has the Federal Government failed in its trust responsibilities?

Mr. Vollmann. We can do better.

Senator McCain. Considerably better.

Thank you, Mr. Vollmann.

Senator Nickles. Mr. Chairman, can I follow up just briefly?

You mentioned this legislation. I was the author of the legislation that allowed the tribes to have redress against the Federal Government for those minerals. We passed it in the early 1980's, and that was to allow the tribes to basically go to court and sue the Federal Government for the minerals on the riverbed. You say that went all the way to the Supreme Court and is where?

Mr. Vollmann. It is now in the U.S. Court of Appeals for the 10th Circuit. The most lucrative legal theory for the tribe, as against the United States, was that the navigation activities of the Corps of Engineers constituted a taking of tribal treaty property, and the U.S. Supreme Court rejected that legal theory on the grounds that the U.S. had a complete defense in the navigational servitude. And so now the case is proceeding on other theories of recovery less lucrative than the taking——

Senator Nickles. They sent it back to the Circuit Court?

Mr. Vollmann. That's right.

Senator Nickles. One final question. This goes back before 1970, but when the navigation waterway was built from the 1940's through the 1960's, was that land, or most of the land, condemned? And did the Federal Government pay for that land? Were there orders of condemnation to achieve the waterway?

Mr. Vollmann. That's my understanding. Yes.

Senator Nickles. Were the tribes paid? Were individuals paid?

Mr. Vollmann. The tribes certainly were not paid, because at that point in time there was no recognition of tribal ownership of those lands—not by the Department of the Interior, and certainly not by the Department of the Army.

Senator Nickles. If the tribes weren't paid, were there individuals paid?

Mr. Vollmann. Presumably.

Senator Nickles. For all 96 miles?

Mr. **Vollmann**. To the extent that the navigation activities covered private property and inundated private lands, I have to assume that. That would be proper.

Senator **Nickles**. So even for the waterway, for the minerals on the waterway, you had individuals that received compensation as a result of condemnation?

Mr. **Vollmann**. I believe so. I think the Corps of Engineers has a different manner of dealing with the minerals that I'm frankly not very familiar with. But I believe there is some sort of compensation.

Senator **Nickles**. And even for these adjacent lands to the waterways, these 96 miles, someone was paid? The Federal Government paid somebody money for that land?

Mr. **Vollmann**. Yes. I don't believe the Government paid the State of Oklahoma for the riverbed, itself, when it was the assumption that the State own the riverbed. I may be wrong about that, but I guess I would be surprised if they——

Senator **Nickles**. But the adjacent lands, the lands that we're talking about——

Mr. **Vollmann**. Yes.

Senator **Nickles** [continuing]. Someone was paid? And now we're finding out that those were possibly paid to the incorrect people?

Mr. **Vollmann**. Yes, that would be the case as to many of these lands, but not as to all of the lands. Some of the lands that the tribes are claiming are lands that were exposed by the channelization of the river, or otherwise by movement of the river prior to the channelization. The Corps of Engineers may not have purchased those lands though the tribe has a claim to them.

Senator **Nickles**. Thank you very much.

Senator **DeConcini**. Mr. Ballen, do you have a question?

Mr. **Ballen**. Mr. Chairman, I just wanted to follow up on cochairman McCain's point. I know he asked the witness whether there has been a failure of the trust responsibility here, and I understand that Mr. Vollmann, as a lawyer for the government, is constrained in answering.

I just want to put on the record that the committee took the deposition of the responsible BIA official involved, and he answered, "Without a survey, it is likely that the tribe is not obtaining the revenues they deserved?" He said, "That's right." The question was: "And that situation has existed for at least the last 10 years?" The BIA official, Mr. Youngdeer, answered, "Yes, that's true." The question was asked, "Whether you found the Federal Government's response in this area fully protecting the tribe's resources?" And he said, "No. We haven't been."

I realize you can't make an admission, but I'm afraid that at least the BIA has in this matter.

Thank you, sir.

Senator **DeConcini**. Mr. Vollmann, thank you very much for your testimony. We look forward to receiving that information.

Mr. **Vollmann**. Thank you.

Senator **DeConcini**. Our last panel of witnesses will be: Ivan Sidney, Chief of the Hopi Tribe; Michael O'Connell, attorney; and Harold Bentley.

Would you all please raise your right hands?

[Witnesses sworn.]

Senator DECONCINI. Mr. Anderson.

Senator MCCAIN. Mr. Chairman.

Senator DECONCINI. Yes.

Senator MCCAIN. I'd like to take a second to welcome Chairman Ivan Sidney from our State of Arizona. He is going to testify, as we know, on an issue of vital concern to the Hopi people, that issue is the protection of the quality of the water on the Hopi Reservation.

Testimony this morning will provide valuable guidance to the committee on how the Bureau of Indian Affairs and the Office of Surface Mining can more adequately fulfill their trust responsibilities in protecting water resources on Indian lands.

We welcome you, Chairman Sidney, to Washington.

Mr. SIDNEY. Thank you, Senator McCain.

STATEMENT OF IVAN SIDNEY, CHIEF, HOPI TRIBE, KYKOTSMOVI, AZ

Mr. SIDNEY. Mr. Chairman and members of the Special Committee on Investigations, on behalf of the Hopi Tribe I again want to thank you for the opportunity to present testimony before you today.

I respectfully request the submission of my full statement for the record, Mr. Chairman.

Senator DECONCINI. It will be included in the record immediately following your oral presentation.

Mr. SIDNEY. Thank you.

That statement stresses the importance of water to the Hopi Tribe, discusses the background of our Peabody coal lease, and details ground and surface water problems arising from that mining operation.

The statement further elaborates on our concern over the discharge of Federal trust responsibility by the Office of Surface Mining and the Bureau of Indian Affairs.

Today I will endeavor to confine my remarks to the latter portion of that statement dealing with Federal trust responsibility concerns. We believe improvements can be made in the permitting system, OSM directives, and BIA resources to better ensure the protection of precious natural resources; namely, the life blood of the desert, water.

With respect to water, OSM has previously placed too much emphasis on expediting permits for the mining of coal at the expense of environmental and trust responsibilities. Allocation of regulatory authority between OSM and the BIA has created illusions of governmental action to protect trust resources while, in reality, little has occurred.

Further, the BIA lacks the resources, if not the will, to meaningfully impact the enforcement of trust responsibility. SMCRA became law in 1977. Peabody applied to OSM for a permit to commence construction of surface water impoundments in 1982. There was no special effort by either OSM or BIA to bring the importance of these new permits to the attention of the Hopi Tribe. Concurrence of the Hopi Tribe was not sought, nor was the Hopi Tribe provided a lease for the use of surface water.

Instead, OSM quietly issued Peabody a permit to establish surface water impoundment. Neither OSM nor BIA has ever questioned whether the Hopi Tribe should be compensated for water impounded by these dams and ponds. OSM and BIA deal Hopi water resources as though they belonged to OSM or the BIA, ignoring the true owner, the Hopi Tribe.

On three occasions in 1984, 1985, and 1986, the Hopi Tribe appealed permits issued by OSM to Peabody. Concerns over surface water impacts were at the core of each appeal. On all three occasions, the BIA was passive and unhelpful. The OSM was the Tribe's adversary.

There are numerous other incidents causing the Hopi Tribe concern that trust responsibilities are not being honored.

The Hopi Tribe, its consultant, and recently the BIA and EPA, have raised concern about OSM's analysis of water issues. The Hopi Tribe wonders who will resolved the conflicting views of OSM, BIA, and EPA. Does any entity recognize a Federal responsibility to aggressively protect Hopi water rights? Will OSM make the final decision about how the Federal trust responsibility to Hopis is fulfilled? What standards of administrative and judicial review apply?

OSM is viewed in many quarters as being either pro-industry or capable of being influenced by politically powerful, but largely invisible, industry interests. While OSM has a programmatic mission based on SMCRA, OSM does not have a similar statutory commitment to the trust responsibility. Indeed, in one Hopi administrative appeal, an OSM attorney objected to a claim by the Hopi Tribe's attorney that OSM's conduct should be measured by the Federal Government's trust responsibility to Indians.

Mr. Chairman, we feel history is repeating itself. For a tribe whose very life blood depends on protecting precious water resources, this state of affairs is completely unacceptable. Our proprietary rights to water must be vigorously protected by the Federal Government's trust responsibility.

Elevated standards of care and elevated standards of review must apply, just like in conventional trust law. At every stage of administrative of judicial review, the burden must rest on Federal agencies dealing with the Indian trust resources to prove that their historic trust responsibilities have been fully and fairly discharged. Nothing short of this will serve to protect our interests.

This committee is to be commended for your efforts to thoughtfully examine this problem. The Hopi Tribe wishes you well in your efforts to make the trust responsibility more meaningful in protecting Indian water rights, and I sincerely thank you for receiving my comments on this occasions.

At this point, Mr. Chairman, I want to defer to the Hopi counsel, Mr. Michael O'Connell, and the Hydro Geochem consultant, Mr. Harold Bentley, to discuss the specifics of this matter with you.

Mr. Chairman, I would like to make some other remarks after their remarks.

I would be happy to answer any questions on the first part of my testimony.

[Prepared statement of Chief Sidney apears in appendix.]

Mr. ANDERSON. Thank you, Chairman Sidney.

STATEMENT OF MICHAEL O'CONNELL, ATTORNEY, HOPI TRIBE, KYKOTSMOVI, AZ

Mr. **Anderson.** Mr. O'Connell, why don't you follow up on the point that Mr. Sidney mentioned, OSM's trust responsibility? The Office of Surface Mining does regulate mine permits at the Hopi Reservation. Could you give us your understanding of what their perception of the trust responsibility is?

Mr. **O'Connell.** As the chairman indicated, there is no specific section in SMCRA which establishes the trust responsibility. The trust responsibility exists as a matter of general Federal/Indian law.

I believe in general that OSM does recognize the principle that the trust responsibility applies to its actions, but it has, in large measure, delegated its responsibilities to the Bureau of Indian Affairs.

Mr. **Anderson.** So there is no Federal statute that has an explicit trust responsibility to Indian tribes under SMCRA; is that right?

Mr. **O'Connell.** That is correct. It is not clearly spelled out.

Mr. **Ballen.** Excuse me, Mr. Anderson.

SMCRA is the Surface Mining and Reclamation Act of 1977; is that right?

Mr. **O'Connell.** Surface Mining Control and Reclamation Act of 1977. That's right.

Mr. **Ballen.** And that's the act that governs the Federal regulation of surface mining on Federal and Indian lands nationally; is that correct?

Mr. **O'Connell.** All lands in the United States. Yes.

Mr. **Ballen.** And, in addition to that, you talk about OSM. That's the Office of Surface Mining, and they are located in the Department of the Interior, and it is their responsibility to administer and protect surface mines for environmental and other hazards; is that correct?

Mr. **O'Connell.** That's correct.

Mr. **Ballen.** Thank you.

I'm sorry, Mr. Anderson.

Mr. **Anderson.** Thank you, Mr. Ballen.

You mentioned there is no statutory responsibility of a trust responsibility in the Surface Mining Act. Is there any regulatory authority that directs that office to consult or contact Indian tribes in matters dealing with Indian lands?

Mr. **O'Connell.** Yes. OSM has promulgated regulations found on this topic at 30 CFR 750.6.

Mr. **Anderson.** Do you find the trust responsibilities working well here in this area?

Mr. **O'Connell.** No; there is a confusing allocation of responsibility in this area between the Office of Surface Mining, on the one hand, and the Bureau of Indian Affairs, on the other.

Mr. **Anderson.** Could you explain that?

Mr. **O'Connell.** Yes.

Mr. **Anderson.** What do you mean by that statement?

Mr. **O'Connell.** Principally, the way the Office of Surface Mining deals with the trust responsibility is that they delegate responsibilities for consulting with Indian tribes on what the trust responsibility interests of the United States are. In the case of the Hopi Indian Tribe, those duties have fallen to the Phoenix Area Office of the Bureau of Indian Affairs.

If I could elaborate, up until quite recently the problem has been that there really has been no staffing or expertise or commitment of resources in that office to carry out these duties, and that is a problem that we ran into in the 1984, 1985, and 1986 appeals.

Mr. **Anderson**. And that's the BIA Phoenix Office?

Mr. **O'Connell**. That's correct.

Mr. **Anderson**. Is that office your trustee in terms of representing the tribe's interest on permitting issues?

Mr. **O'Connell**. The tribe believes, and I think appropriately, that the entire U.S. Government, not just the Bureau of Indian Affairs, but the Office of Surface Mining, as well, has responsibility for ensuring that Hopi trust responsibility rights are not violated.

Mr. **Anderson**. What practical effect on the Hopi Reservation would you find from a lack of fulfillment of the trust responsibility?

Mr. **O'Connell**. Well, the surface water issues, which you have asked us to focus in on, is one matter of particular concern.

Mr. **Anderson**. At the reservation?

Mr. **O'Connell**. That's on the lease hold. The mine is actually—part of the mine is on surface partitioned to the Navajo Tribe, and part of the mine is on surface partitioned to the Hopi Tribe, but the subsurface interest is owned jointly by the two tribes.

Mr. **Anderson**. Where is the impact from that——

Mr. **O'Connell**. Significant impacts are found on Hopi partitioned land surface and further downstream at the Hopi village of Moenkopi, and also some of the surface water percolates down into the ground water.

Mr. **Anderson**. Who does that affect practically? Is that individual Indians or the tribal government?

Mr. **O'Connell**. Both. The individual Indians in the sense that they take water from stock water wells, graze livestock at water sources either in the stream or from stock wells. It affects Hopi villages which have seen, in the case of reduction in wells from ground water pumping, a fall in their well levels which is costing the villages money to pump water up to the surface and the tribe money.

I might add, as well, the Indian Health Service Hospital in Keams Canyon, has seen some impact from wells being lowered.

Mr. **Anderson**. So, in short, because of the impoundment, the Hopi farmers there have less water; is that right?

Mr. **O'Connell**. We believe so. Yes.

Mr. **Anderson**. Is there any Government role in ensuring that the Hopi farmers have more water there?

Mr. **O'Connell**. We believe that is a function of the trust responsibility, and it is also something which is delegated to the Secretary pursuant to the Hopi/Peabody lease. The problem has been that the OSM has issued permits on the one hand for the construction of impoundments with the purpose of protecting water quality, but it has never stopped long enough to ask where the water rights belong to that go into these impoundments.

We believe that water belongs to the Hopi Tribe, and that they are filling those ponds with Hopi water without Hopi consent.

Mr. **Anderson**. So do you find that the Government is looking after the best interest of the Indians here on the reservation?

Mr. **O'Connell**. No; we don't.

Mr. **Anderson**. And specifically because of these impacts on the Hopi farmers?

Mr. **O'Connell**. That's right. We think the Government has a conflict of interest. The OSM has focused upon its responsibilities to protect the environment under the Surface Mining Control and Reclamation Act. It has overlooked its responsibilities under the general trust doctrine.

Mr. **Anderson**. Do they have any obligation to look at that impact?

Mr. **O'Connell**. Certainly they do.

Mr. **Anderson**. And you found that it has not occurred?

Mr. **O'Connell**. Not adequately. The chairman may want to comment.

Mr. **Sidney**. Mr. Anderson, in 1966 when the lease was signed between the tribe and Peabody, BLM estimated that approximately 2,400-acre-feet of water would be used yearly for sending the coal to a slurry line. At that time, Peabody paid $1.67 an acre foot of water.

But the need for water has now raised to about 4,800 a year, and that is affecting the springs—the traditional springs and ponds of the Hopi people.

The lease contained that the Secretary shall find an alternative method if these things are affected and the water table if affected, and they have not been carrying out their trust responsibility, even though there is now beginning to be evidence of the effects of the water. The Secretary has not moved to comply or to put his blanket of trust responsibility over the Hopi Tribe.

STATEMENT OF HAROLD BENTLEY, PRESIDENT, HYDRO GEOCHEM, INC., TUCSON, AZ

Mr. **Anderson**. Mr. Bentley, you are a consultant for the tribe, is that right?

Mr. **Bentley**. That's correct.

Mr. **Anderson**. And you have studied this water issue and the effect of the impoundment and the ground water pumping on the reservation; is that right?

Mr. **Bentley**. That's correct. I worked for the Hopi Tribe in the capacity of reviewing a cumulative hydrologic impact assessment which was prepared by the Office of Surface Mining. I have also participated in evaluation of what possible future monitoring might be done. I have worked generally in the area as a consultant for the BIA in evaluating the water resources of the Little Colorado River Basin.

Mr. **Anderson**. Thank you.

Mr. Sidney testified that there is an impact on the water table in that area. Is that consistent with your findings, also?

Mr. **Bentley**. That is correct. There are a great number of areas in which the data is ambiguous enough that it is difficult to determine whether or not there are impacts, but in some of the areas there is a clear impact.

Mr. **Anderson**. And the Office of Surface Mining's responsibility is to review this and see if there is an impact; is that right?

Mr. **Bentley**. That's correct.

Mr. **Anderson**. What were their findings?

Mr. **Bentley**. Their findings were that there was no impact or damage to the hydrologic system.

Mr. **Anderson**. Are you convinced that is an accurate assessment?

Mr. **Bentley**. Well, as a result of our review and a response to their review we had a meeting in Tucson with OSM. Part of my responsibilities coming out of that meeting were to make a detailed analysis of the affect of surface-water impoundments on the water quality in the area. That detailed statistical analysis resulted in our concluding that there are indeed, impacts.

Mr. **Anderson**. Do you find any pressure on OSM to issue these permits to minimize these damages?

Mr. **Bentley**. Yes, I do. In fact, I have a somewhat philosophical observation I'd like to make if that is appropriate at this point.

I believe that OSM is in a difficult spot. I feel some sympathy for them. The data for a large project like this are very difficult to interpret and often are not sufficient to make a yes or no judgment, but under the rules of SMCRA, OSM has to say that there is or is not damage. They have to come to a definitive conclusion.

On the other side of the issue is the Hopi Tribe. The Hopi Tribe wants uncertainties resolved, and they have a great deal of difficulty—and I do, as well—with the uncertainties in the available data. Without an ability to say yes or no, our view is that there should be a conservative approach taken by OSM. OSM's view is that if they say that there is impact without clear evidence for impact, they shut down a very large operation.

I think that this dilemma could be resolved in the future if there were some amendments or changes made in the rules under which these cumulative hydrologic impact assessments are made.

If OSM were to be allowed to make a provisional permit and demand that the additional data be collected and interpreted to determine whether or not an impact was occurring, but that the operation could proceed, and if all parties to the review process agreed with that provisional permit, I think that would relieve strain on both sides.

Mr. **Anderson**. Now, OSM is required to evaluate these permits and they won't issue them if there is significant damage to the area; is that right?

Mr. **Bentley**. That is correct.

Mr. **Anderson**. And where there is ambiguous data, sometimes it can go either way; is that right?

Mr. **Bentley**. That's the problem. They are forced to come to a conclusion, and yet there is significant doubt whichever way they make a choice.

Mr. **Anderson**. So the decision to issue the permit in this case, or in some cases, could be construed against the Indians as pressure to issue these permits; is that right?

Mr. **Bentley**. That's correct. For example, there are ambiguities in the data as to whether or not Moenkopi is significantly impacted both in flow and quality. Statistical analyses and so on are difficult to perform and interpret. Moenkopi is 70 miles away from the mining area, and the data base covering the intervening 70 miles is just not sufficient to be able to establish clearly whether or not Moenkopi has been impacted.

Mr. **Anderson**. Mr. O'Connell, what role does BIA have in monitoring this process and protecting the tribal properties here?

Mr. **O'Connell**. The regulations provide that the BIA is supposed to analyze, consult the tribe, and then report back to OSM—especially on the protection of noncoal resources. In this case, that would be water.

Until lately, they haven't really been doing much in that direction. We have seen some change in that.

Mr. **Anderson**. Let me ask you: on this particular permit we are discussing, was the permit application filed in 1984?

Mr. **O'Connell**. Correct.

Mr. **Anderson**. When did BIA first get involved in reviewing the permit as they are required to do?

Mr. **O'Connell**. In any real, serious way, I would say about the latter part of 1988. Maybe September, August, July—somewhere in that area.

Mr. **Anderson**. Were they consulted at all by OSM in this process?

Mr. **O'Connell**. They were sent documents by OSM, but we received basically no consultation from the BIA for the first four years or so that this process was underway. So the documents were going to BIA, but the BIA wasn't really doing anything with them.

Mr. **Anderson**. So in terms of an effective trustee protecting the tribe's rights under the permit process, you didn't get effective representation?

Mr. **O'Connell**. That's correct.

Mr. **Anderson**. Is that due to lack of expertise on BIA's behalf?

Mr. **O'Connell**. Partly.

Mr. **Anderson**. Is there a way to improve that process?

Mr. **O'Connell**. What I would suggest needs to be done is that the BIA area office ought to be asked what it would take for them to do the job adequately. I don't think I could tell you what they need. But I think they should be asked what kind of staff they need to do the hydrology issues and the coal issues. I think there probably is additional staff or resources and expertise that they may need to acquire. But I think that if the area office director was asked that question, he could direct his staff to provide you with that answer.

Mr. **Anderson**. Is there a risk when BIA is not involved in the permit process?

Mr. **O'Connell**. Could you repeat the first part of your question?

Mr. **Anderson**. Is there a risk to the tribe when BIA is not involved in this permit process?

Mr. **O'Connell**. Very clearly. The way it currently operates now is that if OSM, the Office of Surface Mining, does not get a report back from the BIA indicating concern, OSM assumes everything is okay and that the permit approval can go ahead with the assumption that there are no trust responsibility problems. So response from the BIA is essential to protecting that trust resource.

Mr. ANDERSON. And what practical impact would that have on the Hopi Reservation through the last period?

Mr. O'CONNELL. The practical impacts have been the impoundment of a substantial amount of water—maybe as much as 25 percent of the stream flow of Moenkopi, much of which is lost to evaporation and therefore lost to downstream users such as farmers, stock people, and contribution to groundwater.

Mr. ANDERSON. Mr. Sidney.

Mr. SIDNEY. Mr. Anderson, in respect to what BIA should do, probably of interest to our Arizona Senators would be that this is where I agree with the Navajo. Mr. Barber, the area director of Phoenix, has probably been the most responsive to us recently on these kinds of issues, and he would probably be glad to provide comment in regards to that. Mr. Wilson Barber.

Mr. ANDERSON. Thank you.

Mr. Bentley, from your perspective as a hydrogeologist, are there areas of improvement from BIA in this area that you can recommend?

Mr. BENTLEY. Very definitely. There has been very little technical oversight from the BIA. I think I agree with Mr. O'Connell's comments in that it is partly a matter of resources available to them.

Mr. ANDERSON. In this case they have to contact you in order to protect their interests here; is that right?

Mr. BENTLEY. That's correct.

Mr. ANDERSON. And you have made a difference in terms of reviewing this permit; is that right?

Mr. BENTLEY. I think so. Much of their comments and their criticism of OSM as to the environmental impact statement was based on review of the work that was produced by my firm.

Mr. ANDERSON. And without that——

Mr. BENTLEY. Which they support.

Mr. ANDERSON. And without that outside help, the tribes interest here wouldn't have been represented; is that right?

Mr. BENTLEY. Very possibly so.

Mr. ANDERSON. No further questions, Mr. Chairman.

Senator DECONCINI. Mr. Anderson, thank you very much.

Chairman Sidney, thank you for your testimony and your interest in this. I compliment you in your leadership of the Hopi people for pursuing these matters. I'm sure, as we have talked before, you are frustrated, as usual, with many of these problems that you have had to confront over the years.

I am advised by staff that we have met with OSM and are going to continue to do so. Your suggestion of getting some information from the BIA people in Arizona will help us, too.

I want to thank you for your testimony and travelling all the way and for your support of this committee. You have been very supportive of our efforts, and it has been very difficult with some of the problems exposed in your country. Hopefully some good will come out of all this anxiety and frustration that we have all gone through.

Senator McCain, did you have any questions?

Senator McCain. Thank you, Mr. Chairman.

I think that a very serious issue has been raised here this morning. I hope we'll be able to convince the appropriate responsible authorities to get into it. We appreciate your being here, Mr. Chairman. We look forward to working with you to resolve these problems.

Thank you very much, Mr. Chairman.

Senator DeConcini. Mr. Chairman, do you have anything further?

Mr. Sidney. Yes, Mr. Chairman. If I may, I would like to make some concluding remarks.

Senator DeConcini. Please proceed.

Mr. Sidney. In conclusion, Mr. Chairman, allow me to thank this committee and its staff for its specific assistance in a matter relating to coal royalty evaluation and for the committee's meaningful oversight contribution to the Native American generally.

Regarding coal royalty evaluation, a recently issued Minerals Management Service regulation intended a revenue neutral impact on Hopi and other Indian coal royalties. However, as interpreted by certain coal royalty payers, that regulation threatens to dramatically reduce royalty payments.

For example, the Hopi Tribe alone is threatened with the loss of $4.8 million between the years of 1989 and 1997. This committee's interest in this issue, particular thanks to efforts of Senator McCain and your fine staff, Mr. Chairman, has resulted in a reevaluation of any regulatory interpretation that does not achieve revenue neutrality.

As revenue neutrality is an imperative to the Hopi Tribe, I want to express my sincere appreciation to the committee on behalf of the Hopi people for your leadership in ensuring fair play in this regulatory issue.

Mr. Chairman, I understand that I may be among the final witnesses before this special committee. That being the case, allow me to compliment this committee on your many landmark achievements.

In the areas of tribal responsibility and accountability, the tragic sexual abuse of Indian children, private and public sector neglect, excesses at the expense of Indian, conflict of interest in representing tribes, and the discharge of the Federal Government's trust responsibilities, this special committee has brought new meaning to the concept of oversight by overseeing, rather than overlooking, pressing problems impacting the daily lives of tribes across this land.

The Hopi Tribe in particular—and I would suggest all of Native America—commend you, Mr. Chairman and staff, on a job well done. We are, indeed, grateful in having two of our Arizona Senators involved. Having a traditional Hopi Tribe, we want to bestow on you our prayers. Our future is indebted with you to actually have us recognize our true sovereignty. We truthfully, from our heart, want to thank you.

I understand that today we had sunshine, and I hope some of these rains go back to Hopi to bring us the moisture that we need.

Again, from the bottom of our heart we want to thank you and your committee and our Senators for a wonderful job.

Senator DeConcini. Chairman Sidney, thank you very much. I think your being here has brought us sunshine for the first time in 21 days. [Laughter.]

We thank you for that. We thank you for the interest and very laudable statements.

I also want the record to show my deep appreciation—and know Senator McCain feels the same way—to Ken Ballen and the entire staff of the committee for the tireless work and hours that they have put in for preparation of these hearings.

The committee will have another 2 half days of hearings on some minor subjects, and that will happen some time in June. We also plan to pursue the Indian Health Service matter that we were unable to resolve the other day. We will have some hearings on that subject matter before we commence the very, very difficult and long process of writing our report and recommendations.

I want to thank the committee again and the staff for all the tremendous work that they've given.

Senator McCain, did you have anything to add?

Senator McCain. Mr. Chairman, it is my understanding that we do plan on several more hearings to clean up some loose ends.

Senator DeConcini. That's correct.

Senator McCain. For example, the IHS testimony. Perhaps maybe for the benefit of the rest of the committee and anyone interested maybe we could get a little idea as to what our tentative plans are. Can you do that yet?

Senator DeConcini. Mr. Ballen.

Mr. Ballen. Thank you Mr. Chairman and Cochairman McCain. We anticipate having some hearings in the early part of June, as the chairman indicated, to clean up some loose ends. We have some timber issues, some possible housing issues, some law enforcement issues, and we plan to pursue vigorously the IHS and schedule that as soon as possible.

Senator DeConcini. Thank you.

The committee will stand in recess subject to the call of the Chair.

[Whereupon, at 12:09 p.m., the committee was recessed, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

Testimony
of
Principal Chief Wilma P. Mankiller
Cherokee Nation of Oklahoma
Before the
Special Committee on Investigations
of the
Senate Select Committee on Indian Affairs
May 18, 1989

Mr. Chairman, my name is Wilma Mankiller. I am Principal Chief of the Cherokee Nation of Oklahoma. Here to testify with me today are my colleagues Governor Bill Anoatubby of the Chickasaw Nation, Chief Hollis Roberts of the Choctaw Nation, and Tina Jordan, Executive Director of the Arkansas Riverbed Authority. We appreciate the opportunity to present to the Special Committee on Investigations our concerns about the federal government's failure to fulfill its trust responsibilities and properly manage our tribal lands in the Arkansas Riverbed.

Introduction

I want first to take a moment to thank the Special Committee for its examination of issues of concern to Native Americans. I fully support the Committee's work in identifying ways to strengthen tribal government and aggressively protect Native American human and natural resources. While I may not have agreed with every issue examined, in light of the whole record I believe the Committee has addressed the right issues, fairly and completely. I know this work has not been easy or always popular. That is why I want to congratulate you for tackling the controversial issues that needed airing, including charges of oil company theft, tribal corruption, sexual abuse of school children, and particularly government mismanagement of tribal lands and natural resources.

I look forward to continue working with you on these and other issues of concern to all Native Americans.

Background of Tribal Ownership of the Arkansas Riverbed

Mr. Chairman, when I testified before you at the first of your hearings in late January, I reviewed a number to these topics and brought to your attention the urgent problems that our three tribes face because of the federal government's mismanagement of our tribal lands in and along the Arkansas River. We all are very grateful to the Special Committee for taking an active interest in and devoting this special hearing to our riverbed problems.

First, let me summarize the sad history of the Cherokee Nation's ownership of its portion of the Arkansas Riverbed. Over 100 years ago, we acquired by treaty more than 14 million acres of land in eastern Oklahoma bordered on the south generally by the Arkansas River, and on the east along a line commencing at the point that the Grand Neosho River joins the Arkansas River. Eventually, most of the 14 million acres of tribal ~~lands~~ land were allotted and transferred to individual tribal members. After Oklahoma became a State, the Department of Interior, our trustee, erroneously determined in 1908 that title to the Arkansas Riverbed had passed to the State, not to the three tribes. After repeated attempts to challenge that determination, the three tribes finally successfully sued the State of Oklahoma for an accounting of oil and gas revenues it was receiving from the riverbed. The United States Supreme Court determined in 1970 that, in fact, the Cherokee, Choctaw and Chickasaw Nations always had fee simple title in the 96-mile stretch of the Arkansas River. In a subsequent court decision, riverbed lands below the point where the Canadian River enters the Arkansas River were divided down the middle with the northern half granted to the Cherokee Nation, and the southern portion granted the remaining one half to the Choctaw and Chickasaw Nations.

Since those court decisions, the federal government has held these riverbed tribal lands in trust for the benefit of our three tribes as the federal government was obligated to do even before the decision. Yet, just as we paid a heavy price for relying on the erroneous legal opinion of our trustee in 1908, we have continued to lose countless millions of dollars by our trustee's failure to fulfill its trust obligations to manage properly the riverbed lands after they were confirmed and redesignated as tribal lands.

Genesis of Tribal Lands Mismanagement

Here is how the story turns from a sad one to a tragedy. Between 1944 to 1970, one-third of our riverbed acreage was used by the U.S. Corps of Engineers at the direction of Congress to construct the McClellan-Kerr Navigation System of dams and a narrowed navigation channel. The project destroyed the natural identification of the riverbed and its banks. To its credit, the Department of Interior's Bureau of Indian Affairs ("BIA") acknowledged in 1972 the need for a government-sponsored study to assess the value for the riverbed tribal lands destroyed by the Corps' construction and identify boundaries so that land ownership and use conflicts could be resolved. At the time, the government was planning to buy or lease the riverbed tribal lands from the three tribes, consistent with precedents for compensating tribes for damaging or taking their tribal lands. Accordingly, the Department's Fiscal Year 1973 budget request to the Congress asked for total appropriations of $2.2 million for a five-year program ($440,000 per year) to estimate the value of and to survey precisely the Arkansas Riverbed lands. The Congress agreed to the request.

Unfortunately, the program was never fully funded. Urgently needed cadastral surveys were never commenced to identify the riverbed boundaries and quiet title. And hundreds of trespassers have been permitted to occupy our tribal lands and reap the benefits of our natural resources!

As to the government's numerous commitments to compensate the tribes for taking and destroying riverbed lands for the navigation system, the Department stalled and finally reneged in the late 1970's. Then it advised us to go to court if we wanted compensation. Yet in order to do so, we had to ask the Congress to enact a special law to waive the statute of limitations that otherwise would bar suit. The Cherokee Nation has sued the United States for the taking and for violating its duty of fair and honorable dealings. The latter case is still pending before the Tenth Circuit Court of Appeals.

As to the government's obligation as trustee to survey and properly manage our valuable tribal riverbed lands, again the Department has stalled, and stalled. By statute, the Department's Bureau of Land Management ("BLM") has sole authority to certify the cadastral surveys needed as evidence in title disputes over tribal lands. Yet the Department has done little or nothing over the years to see that surveys are completed, trespassers are removed, tribal lands are appraised and reasonable surface and subsurface leases are executed. This is true despite the laws Congress has enacted directing the Secretary to manage the oil and gas, sand and gravel and other surface and subsurface resources on tribal lands.

As I testified before this Committee in January, we have tried to resort to self-help, but without BLM-certified surveys, our hands are tied. In surveying and land management matters, our trustee has been our detractor, not our supporter. Laws of Congress designed to assist have been misused to subjugate.

Specific Examples of Mismanagement

Obviously, the first example of mismanagement is our trustee's failure even to identify the corpus of its trust by surveying and identifying the boundaries of the Arkansas Riverbed tribal lands.

Let me give you some other specific examples of mismanagement. In 1973, it was decided to create the Arkansas Riverbed Authority to help our three tribes identify trespassers along the banks of the Indian-owned portion of the Arkansas River and to compile a data base to allow the tribes to negotiate with trespassers. Unfortunately, however, the Authority's funding from BIA has been sporadic and very inadequate for personnel to achieve the Authority's long-term goal. The Executive Director, Tina Jordan, is with us today to tell you more about the Authority's work and answer any technical questions you may have about trespasser identification, litigation and settlement efforts.

Now I ask you to take a look at the aerial maps produced as part of the government-sponsored riverbed study conducted in the mid-1970s. You can see the lines marking the north and south boundaries of the tribal riverbed as the Arkansas River flows eastward. Highlighted is the location of the navigation channel, usually somewhere within the riverbed. The surface of the tribal riverbed lands outside the channel is available for leasing for farming, grazing, sands and gravel extraction, and other economic development purposes. Generally, the lands between the marked boundaries are available for subsurface oil and gas leasing. The natural gas revenue potential is particularly great because the riverbed runs through the center of the rich Anadorca Basin, about which you will hear more later from experts.

As to surface leasing, Mr. Chairman, it is obvious from the map that the land is being farmed extensively within and adjacent to the riverbed. Yet, believe it or not, most of these farming operations are currently unauthorized to use these tribally owned properties. Nor has the BIA done anything to remove those observable, unauthorized farmers. Even worse, the U.S. Corps of Engineers has itself leased our tribal lands and received money from soybean operations on tribal lands. Has the Corps forwarded to us the revenues from these leases? No. Furthermore, for Corps flood easements across tribal lands, the Corps has paid the unauthorized occupants -- not the tribes!

We realize that this Committee has not yet had an opportunity to assess the role of the Corps of Engineers in the management of our tribal lands. We believe, however, that their role has been significant and we ask you to pursue your investigation in this area.

As to subsurface leasing, Mr. Chairman, let me make a few remarks about our oil and gas leasing problems -- the details will be provided by later witnesses. The law clearly requires specific approval from the tribe before the BIA can place tribal lands up for leasing by competitive bid. At least for the Cherokees, BIA officials have never sought such approval before leasing our riverbed lands. Only very recently has the tribe been given an independent appraisal of the subsurface property interest to be leased, although an appraisal is essential for the BIA or us to determine the adequacy of the lease offer.

One of the most adverse affects of our trustee's mismanagement is the ongoing drainage of our natural gas reserves below our tribal lands by production from leases adjoining the riverbed. Without BLM-certified surveys, neither we nor the Secretary can defend the riverbed mineral leases that the Secretary himself initiated and approved. Consequently, those who unlawfully occupy the land and/or lessees adjacent to the riverbed are left alone to enrich themselves at our expense and, perhaps more significantly, at the expense of our own lessees who have paid for the drilling and production rights to the subsurface resources of our tribal lands. We could not possibly be receiving a fair market value for our leases, as required by law, when competitive bidders know that they will be disadvantaged because the leases they seek will not and cannot be defended by the Secretary!

Why has the Department of Interior been so indifferent and so lethargic? Why has it not pressed for the remaining portion of the $2.2 million, approved by never fully appropriated, for riverbed boundary identification? It was only after we prodded repeatedly that BLM allocated the paltry sum of $30,000 for riverbed surveying in December 1987. With that money, the BLM has completed surveying of only one mile of the 96-mile riverbed. At that rate, we can expect to suffer at least another 20 years of lost surface and subsurface natural resource revenues!

Whether it is indifference, lethargy or bureaucratic morass that prevents the Department from properly tending to its trust responsibilities, it is no wonder that the Department's Regional Solicitor in Muskogee, Oklahoma, Tim Vollman, candidly testified before this Committee on February 23 that tribes "often choose to file their own lawsuits, rather than wait for the U.S. to make that decision." To me, it is an even sadder state of affairs when a tribe has to resort to litigation to force the Department to do its job. I will say, however, that the presence of Mr. Vollman and the new Acting Area Director Merritt Youngdeer in the Muskogee Office has infused a more positive approach to the fulfillment of BIA trust responsibilities. We will continue to meet and work with Department officials to expedite urgently needed surveying and to initiate any necessary legal action to resolve title disputes.

To add some impetus and make our tribe whole, the Cherokee Nation has asked the courts and the Congress for help. We recently filed suit in the U.S. Claims Court against the United States for breach of its fiduciary duty to manage properly the tribe's surface and subsurface natural resources, and for damages. We also have joined with the Chickasaw and Choctaw Nations in requesting the Congress to appropriate $1.5 million for Fiscal Year 1990 to complete the needed surveys, adequately fund the Arkansas Riverbed Authority, and resolve land title disputes. We have received staunch support for this request from our Oklahoma Senators and Congressmen and are especially grateful to Senator Nickles for his letter to the Department requesting documents to support the request.

Conclusion

I will conclude by placing the riverbed issue in the context of our larger goal of developing the full economic, human and natural resource potentials of our three Indian Nations. My colleagues will give you their own perspectives in a moment, but I want to tell you how much our riverbed tribal lands mean to us and what we can make of them once they are entirely ours to develop.

To us, the Arkansas Riverbed represents almost 80 years in pursuit of rights in tribal lands at great cost in lost surface and subsurface leasing revenues, sand and gravel resource destruction, and litigation expenses. We will not rest until we are fairly compensated for these loses.

What can we do once we have achieved this objective? We will realize the full leasing and development potential of our riverbed lands -- just as we have developed more jobs, better schools, health care and innovative housing opportunities for our tribal members. Our Cherokee Nation Industries, Inc. is one of the largest and most successful Indian-owned defense subcontractors in the United States. We are working with the Southwest Power Administration and the Corps of Engineers to build a hydropower plant on the Arkansas River. And so far we have negotiated reasonable and improved leases that have allowed former trespassers the right to stay and develop our riverbed lands for our mutual benefit. We have demonstrated that we are fully capable of making the very most of what little we have to develop. All we ask for is responsiveness and fair treatment by the trustee of our tribal lands.

For nearly 20 of the 80 years, our three tribes have waited for our trustee to fulfill its fiduciary duty to survey tribal riverbed lands and resolve title disputes. Every day these lands remain unsurveyed, the tribes are losing countless economic development benefits. This continuing injury can be remedied in part by the Congress appropriating at least $1.5 million for FY 1990 for cadastral surveying and trespass litigation support.

I sincerely thank this Special Committee for the serious attention it has given thus far to the Arkansas Riverbed mismanagement problem. We ask your continued assistance both with our appropriations efforts and by interceding with other Departments, most significantly the Corps of Engineers and Bureaus of the Department of the Interior, which must be actively involved to get these problems resolved.

Testimony of

Bill Anoatubby

Governor of the Chickasaw Nation

Before the

Special Committee on Investigations

of the

Senate Select Committee on Indian Affairs

May 18, 1989

Mr. Chairman and members of the committee, please allow me to preface my remarks with a short note of appreciation to the committee for its efforts and for allowing me to offer testimony. We are thankful to have such opportunities to interact directly with the Congress and its members and to share our concerns.

My name is Bill Anoatubby. I am the governor of the Chickasaw Nation, an Indian nation located in south central Oklahoma. Our jurisdictional territory covers more than 7,638 square miles with a total population in excess of 250,000. Our tribal membership now numbers approximately 25,000.

The Chickasaw Nation retains ownership, in the amount of a one-fourth undivided interest, in a 96-mile portion of the Arkansas riverbed. Ownership of a riverbed by a governmental entity outside of a state government or the federal government, recognized as eminent domain, is a rare concept. Fee simple title to the riverbed was granted to the Cherokee, Choctaw and Chickasaw nations by the United States in 1835. When Oklahoma became a state in 1907, the state asserted jurisdiction over the riverbed. The tribes challenged ownership of the riverbed before the United States Supreme Court (Cherokee, Chickasaw and Choctaw Nations v. State of Oklahoma (397 U.S. 620 (1970)). The high court ruled that the three tribes did in fact own the 96 miles of riverbed, from the Three Forks area near Muskogee, Oklahoma, to the Oklahoma-Arkansas state line. Since that time, the United States has held those tribal lands in trust for the benefit of the three tribes.

From 1944 to 1970, the United States Corps of Engineers constructed the McClellan-Kerr Navigation Project on the riverbed and the land adjoining it. Beginning in 1970, with the Supreme Court's decision, the Bureau of Indian Affairs has recognized the need for the identification of these specific tribal lands for the protection of the lands and for the benefit of the tribes through development and control of those resources located on those lands.

The U.S. Department of the Interior requested, from the Congress, $2.2 million for a five-year program (to begin in 1973) to perform surveys to specifically locate and identify those lands and to estimate the value of them and the resources they contain. Congress approved that request but the five-year program was never funded. Because of this lack of funding, the Bureau of Land Management has never completed the cadastral surveys.

In the mid- to late 1970s, emphasis was placed by the tribes on suing the United States for loss of revenue and resources along the riverbed due to the lack of controls exerted over these lands by the federal government on behalf of the tribes. This effort has since been negated and new efforts by the tribes are for the protection and utilization of this major asset, in the form of land base and resources, for the tribes themselves.

There are approximately 22,814.935 acres included in the lands owned by the three tribes along the Arkansas River. In 1987, the Bureau of Land Management allocated $30,000 to survey these lands. This amount of funding allowed for 789 acres to be surveyed, which leaves 22,025 acres yet to be surveyed.

In the fall of 1988, tribal representatives met with officials of the U.S. Department of the Interior to seek a three-year plan to survey the Arkansas riverbed lands and for adequate funding of the Arkansas Riverbed Authority (the joint tribal entity which administers lands and resources on behalf of the tribes themselves). In March, 1989, a meeting was again held to discuss a Memorandum of Agreement among the tribes and the Bureau of Indian Affairs and the Bureau of Land Management. The proposed three-year program would provide for cadastral surveys of those lands. Such a massive project would require the establishment of an Oklahoma office for the Bureau of Land Management to oversee the surveying. Officials from the three tribes have again requested funding for this project from the Congress, based upon the estimates provided by the Bureau of Land Management.

While the Bureau of Indian Affairs has not effectively met its trust obligations to the three tribes insofar as jointly-owned lands along the Arkansas River are concerned, there is evidence that the Bureau has exerted efforts to meet those needs; however, with inadequate funding, little can be done. Since the ruling issued by the United States Supreme Court, the three tribes have awaited proper and just actions. In that time period, more than 1,000 cases of trespass have been committed on these tribal lands. Each day that these lands go unsurveyed, the tribes lose precious resources and the potential for realization of tribal income from those resources and lands dwindles exponentially.

In relation to the income that could be derived from a resource ofthis size and potential, the three tribes have realized very little return. The jointly-owned lands along the river have been utilized, without permission or authorization from the tribes, by individuals, corporate entities and farmers and ranchers, all of whom have benefitted substantially from their utilization of *tribal* resources. Although the award of title to these lands has been made, whatever physical control the tribes have attempted to exert has been halted because tribal boundaries are unclear and not appropriately defined.

Those who have utilized the tribally-owned trust properties in trespass, have done so for such a long time that there is almost absolute refusal on their part to acknowledge the tribes' ownership. The resources along the river have proven of such value to those using the properties in trespass, that when the tribes do attempt to exert physical control, tribal boundaries are challenged. Rejection of recognition of tribal ownership and resistance to the exertion of controls by the tribes cause untold losses to the tribes for inability to capitalize on those valuable assets and resources.

Proper appropriations by Congress for the completion of the surveys, and for the operation of the programs to administer these lands, will enable the U.S. Department of the Interior and the Bureau of Indian Affairs to fulfill their fiduciary duties and obligations to the Cherokee, Chickasaw and Choctaw nations.

Again, I thank you, Mr. Chairman, and the members of this committee, for allowing us to appear and offer testimony. I appreciate your interest and your concern and hope that a resolution to this major problem can be effected.

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
REGIONAL OFFICE, SOUTHWEST REGION
P.O. BOX 3119
TULSA, OKLAHOMA 74101

REFERENCE NO.
BIA.SW.2370

June 1, 1989

Honorable Dennis DeConcini
Chairman, Special Committee on Investigations
Select Committee on Indian Affairs
United States Senate
Washington, D.C. 20510-6450

Re: Arkansas Riverbed Claims

Dear Mr. Chairman:

This responds to your request at the hearing of May 18, 1989, for an estimate of the cost of adding five attorneys, with necessary support services, to the staff of the Regional Solicitor's office in Tulsa, Oklahoma, for the purpose of prosecuting trespass claims against third parties on the Arkansas Riverbed tribal lands on behalf of the Cherokee, Choctaw, and Chickasaw Tribes.

First, I would like to clarify my response of "five lawyers" to your question whether "ten, twenty, or one hundred more lawyers" would be needed to prosecute as many as one thousand trespasses on the riverbed lands. My reference to "five lawyers" was to suggest that no more than five additional attorneys would aid in hastening the prosecution of these important claims. As I said, I am not yet in a position to give an informed estimate of my staff needs for this purpose. We have been examining the resource data, title histories, maps, and applicable law since February of this year for purposes of choosing the appropriate cases to prosecute as an initial matter, and developing the evidence necessary for successful prosecution. I do not know whether five, fifty, or more lawsuits will need to be brought. This depends on the success of our first initiatives and the possibilities for negotiated settlements. Thus, it is too early to make any long-range predictions.

My affirmative response to Senator Nickles' question whether it might take 20 years to litigate these claims to finality was based on a scenario of protracted appeals to higher courts, not on any expectation of bureaucratic delay which could be cured by increased funding or staffing. For example, the riparian claims of the Omaha Tribe in Iowa were filed in federal court in 1975, tried in 1977, and heard by the U.S. Supreme Court in 1979. Final judgment was not entered until 1986.

Similarly, the suggestion by Chief Roberts of the Choctaw Nation that there are one thousand trespassers does not necessarily mean that one thousand lawsuits are required. First, we believe there are far less than one thousand trespassers whom we might name as defendants in litigation. Many people and entities may be willing to negotiate settlements with the Tribes. Some have already done so. Secondly, the scope of a lawsuit should be defined in reference to a specific tract, not a single defendant. We expect that numerous parties lay some sort of claim to each tract. Absent releases or settlements, they would each have to be named as a defendant in a quiet title suit.

Finally, as I explained in my statement to the Special Committee in February, the principal task of attorneys in the Solicitor's Office in such endeavors is to prepare litigation reports for the use of the Department of Justice for the prosecution of such claims. After Justice Department attorneys file the lawsuit, we ordinarily continue to act as co-counsel throughout the litigation. But the principal responsibility for the prosecution of lawsuits in the name of the United States, including claims brought by the federal trustee on behalf of Indians and Indian tribes, has been delegated by statute to the Attorney General, not the Secretary of the Interior.

Following is an estimate of the annual cost of the addition of five attorneys to the Tulsa Regional Solicitor's Office:

Personnel Costs:	Salary	+ Benefits	= Total
One GS-13 attorney	$41,121	$6,580	$ 47,700
One GS-12 attorney	34,580	5,533	40,113
Two GS-11 attorneys	57,704	9,233	66,937
One GS-9 attorney/paralegal	23,846	3,815	27,661
One GS-5 clerk-typist	15,736	2,518	18,256
One GS-4 clerk-typist	14,067	2,251	16,318
			$216,985
		TOTAL	$217,000

Equipment:		
Furniture		$ 2,500
Word Processing		12,000
Telephones		2,000
Photocopying		500
	TOTAL	$ 17,000

Space (Note: The current offices of the Regional Solicitor in the Page Belcher Federal Courthouse in downtown Tulsa will accommodate, at most, three additional attorneys; and there is probably not space available in that building for further expansion. Nonetheless, for simplicity's sake, we are providing an estimate based on the rentals currently charged by the U.S. Postal Service in Page Belcher.)

1,000 square feet	$ 13,000
Other Costs:	
Training	$ 5,000
Travel	18,000
Library (including Westlaw)	5,000
Postage	3,000
Supplies	3,000
TOTAL	$ 34,000
SUBTOTAL	$281,000
If the office needs to be moved to another location in Tulsa, considerable additional costs will be incurred	$ 50,000
GRAND TOTAL	$331,000

I hope this information is helpful. I cannot now say that my office has a need of this magnitude. Nor, obviously, does the above estimate constitute a request for supplemental funding.

Please be assured that the Solicitor's Office is committed to resolving these claims as soon as possible. Please let us know if you need further information concerning the above estimate.

Sincerely,

Tim Vollmann

Tim Vollmann
Regional Solicitor

cc: Solicitor Ralph W. Tarr
Senator Donald Nickles

STATEMENT
OF
IVAN L. SIDNEY
CHAIRMAN
HOPI INDIAN TRIBE
BEFORE THE
SPECIAL COMMITTEE ON INVESTIGATIONS
OF THE
SENATE COMMITTEE ON INDIAN AFFAIRS

MAY 18, 1989

Mr. Chairman and Members of the Special Committee on Investigations, on behalf of the Hopi Tribe, I thank you for the opportunity to testify here today.

INTRODUCTION

By definition, water is scarce in a desert. The Hopi Tribe has lived for thousands of years in a desert. By careful use of water, Hopis grow crops, raise livestock, live in villages and engage in business. To continue these activities, now and for future generations, we need water.

Water is our most precious natural resource. In our religious ceremonies, we pray for rains. Some springs are still considered sacred, indispensable to carrying out certain ceremonies. On numerous occasions religious pilgrimages are made to these religious shrines. Congress has expressly recognized the importance of Hopi springs by specially protecting Cliff Springs. [25 U.S.C. Sec. 640(d)19].

Today, I will discuss our concerns over water as they relate to the trust responsibility of the United States to regulate the impact on Hopi water usage from Peabody Coal Company's use of surface and ground water. I will begin with an overview of the Peabody lease, and our ground and surface water concerns generally. Finally, and more specifically, I will address the Tribe's concerns with trust responsibility.

Peabody Lease

Portions of the Black Mesa mine were jointly leased by the Hopi and Navajo Tribes to Peabody in 1966. Other portions of the mine were leased by the Navajo Tribe alone in 1964 on land claimed by both Tribes.

The Black Mesa Mine is at the head of the Moenkopi and Dinnebito watersheds. Rain, snow and springs flow down the washes providing water for livestock, farming, woodlands, and other needs. Immediately downstream from the lease is the northern portion of Hopi Partitioned Lands. The Hopi Tribe plans to use these surface waters for agriculture and new community developments. Ground water beneath the mine supplies springs and wells across the Hopi Reservation that serve municipal, farming, livestock and other needs. Further, supplementing flows to streams such as Moenkopi

Wash.

Since Peabody began pumping ground water, and subsequently impounding surface water within the leasehold, the Hopis have witnessed decreases in stream flows -- most significantly in the Moenkopi Wash. We have watched springs run dry and our wells drop below expectations. The Hopi Tribe is extremely concerned with this diminishing water flow.

Ground Water

The Hopi Tribe could not comprehend the amount of water that the mining operation would demand under the original lease. The expectation of many Hopis, including the Tribal Council, was that the coal would be transported by rail rather than by a coal-water slurry line. In 1970, the Bureau of Land Management (BLM) estimated that an average of 2400 acre feet of water would be used for the coal slurry. (See 1970 BLM-BIS for Navajo Generating Station at p. 87.) By the mid-1980's, actual water usage for coal slurry had escalated to 4500 to 4800 acre feet of water per year. We believe that this ground water pumping is damaging Hopi municipal, agricultural and livestock wells and springs, and depleting spring-fed flows to Moenkopi Wash.

When we renegotiated this lease with Peabody and its utility coal purchasers, we were unsuccessful in our attempt to have Peabody discontinue the ground water slurry. However, we were successful in raising the price of ground water as a market incentive to discourage wasteful use of this

precious resource. The original lease provided the Hopis compensation of $1.67 an acre foot for water, a scandalously low price. We have always wondered why the United States approved that rate for scarce ground water. Peabody and its customers have now agreed to pay each Tribe $150 for the first 2800 acre feet of ground water and $300 to each Tribe for each additional acre foot.

Surface Water

Of increasing concern to the Hopi Tribe is Peabody's quiet establishment of a large number of surface water impoundment structures. Construction of these facilities was not anticipated in 1966 when the original lease was signed. In 1977, Congress enacted the Surface Mining Control and Reclamation Act -- SMCRA. One of the principal goals of SMCRA is to prevent water pollution from coal mines. To comply with SMCRA, Peabody has constructed 150 dams and impoundments to retain all surface water within the leasehold. Still more dams and ponds are planned...over 200 in all. Peabody plans to permanently control over 70 square miles of watershed with dams and ponds -- even after mining has ended. Twenty-five percent (25%) or more of Moenkopi Wash surface flows will be impounded in these structures.

Water that historically flowed down Moenkopi Wash and Dinnebito Wash is being lost due to evaporation and infiltration in these retention structures at a rate of 50% or higher, with a devastating impact downstream. We find that water for livestock, farming, and potential community usage has been either evaporated or used by Peabody for dust suppression or other mining purposes.

Some may presume that the Hopis agreed to these surface water dams and impoundments; or at least, are being paid for this surface water. Neither of these assumptions is correct. The Hopis never agreed to these impoundments and dams. Peabody proposed them. The Department of Interior's Office of Surface Mining approved them. The concurrence of the Hopi Tribe was neither requested nor given. The Hopi Tribe is not paid for water consumed by these dams and impoundments.

Trust Responsibility

With respect to water, OSM has previously placed too much emphasis on expediting permits for the mining of coal at the expense of environmental and trust responsibilities. Further, the BIA has lacked the resources, if not the will, to meaningfully impact the enforcement of trust responsibility. Allocation of regulatory authority between OSM and the BIA has created the illusion of governmental action to protect trust resources -- while in reality little has occurred. The result has been inadequate attention to specific statutory and regulatory requirements in SMCRA for the protection of water resources; confusion and confrontation between the Tribe and OSM at times; and an unsatisfactory effort to protect water as a special tribal trust resource.

SMCRA became law in 1977. Peabody applied to OSM for a permit to commence construction of surface water impoundments in 1982. There was no special effort by either OSM or the BIA to bring the importance of these new permits to the attention of the Hopi Tribe. An environmental assessment (EA) was performed by OSM, concluding no significant impact to water resources from impounding Hopi water. Concurrence of the Hopi Tribe was not sought, nor was the Hopi Tribe provided a lease for the use of Hopi surface water. Instead, OSM quietly issued Peabody a permit to establish surface water impoundments; then a few more, and a few more, until now there are in excess of one hundred and fifty (150) ponds, with an additional two hundred (200) still being planned. Neither OSM nor the BIA has ever questioned whether the Hopi Tribe should be compensated for water impounded by these dams and ponds. OSM and the BIA view Hopi water resources as though they belonged to OSM or the BIA, ignoring the true owner -- the Hopi Tribe. The renegotiated rate for ground water does not excuse the Secretary's duty under the lease or his trust responsibility to force Peabody to discontinue ground water pumping if damages are occurring to the aquifer. Under SMCRA, OSM is required (a) to study and make findings whether mining is impacting the quantity or quality of surface water or ground water, particularly "water availability" [30 U.S.C. Sec. 1257(b)(11) and Sec. 1360 (b)(3)]; and (b) to require a mine operator to replace the water supply of any person who obtains water for domestic, agricultural or other uses from an underground or surface supply affected by mining operations [30 U.S.C. Sec 1307(b)]. Quite frankly, we are concerned that OSM is reluctant to order Peabody to provide supplies of water to affected persons on the Hopi Reservation.

A consultant retained by the Hopi Tribe has found numerous errors in a critical technical document utilized by OSM and required by SMCRA to carry out its duties in the statutory sections outlined in the previous paragraph, i.e. the Cumulative Hydrologic Impact Assessment (CHIA). The original technical document concluded that material hydrologic damage is not being caused by Peabody ground water pumping or surface water impoundments. A meeting between technical representatives of OSM and the Hopi Tribe in January resulted in OSM agreeing to revise these errors. We have not seen the revised document.

On three occasions, in 1984, 1985 and 1986, the Hopi Tribe appealed permits issued by OSM to Peabody. Concerns over surface water impacts were at the core of each appeal. On all three occasions the BIA was passive and unhelpful. The OSM was the Tribe's adversary.

There are numerous other incidents causing the Hopi Tribe concern that trust responsibilities are not being honored, including the following:

1. On at least two occasions after the Hopi Tribe, the Navajo Tribe and Peabody renegotiated the mining leases to require increased water payments, OSM asked whether those payments were compensation to the Hopi Tribe for damage caused by Peabody's water use. This was clearly not the case, but rather an effort on the part of the Tribes to renegotiate a contract that otherwise provided for a scandalously low payment of $1.67 per acre foot.

2. Further, OSM has improperly given Peabody the benefit of

hydrologic and scientific uncertainties. For example, OSM created a measuring error of 20% for a stream gauge at Moenkopi. Actually, the gauge has a 15% error factor for daily flows; on a monthly basis, the error factor is 5%. Nevertheless, OSM added another 5% for good measure to the 15% daily error factor to arrive at 20% error factor. OSM then required a 20% measured reduction in Moenkopi stream flows before OSM would assume any impact to Hopi water rights from Peabody mining operations. OSM is clearly giving the benefit of the doubt to the wrong party. Given the trust responsibility to protect scarce Indian water resources (amplified by SMCRA and the National Environmental Policy Act [NEPA]), all doubts caused by error factors should be resolved in favor of a damage conclusion. EPA's letter to OSM agrees that OSM has misused this error factor analysis to minimize material hydrologic damage. [See EPA letter from Jacqueline Wyland to Billie Clark, January 20, 1989, paragraph 4, pages 5-6].

3. OSM regulations delegate substantial responsibilities to the BIA, including protection of non-coal resources, such as water. [See 30 CFR 750.8(a)(2) and (4), and (d)]. In response to permit applications approved by OSM in 1982, 1984 and 1986, the BIA provided no meaningful input. The BIA Agency Office in Keams Canyon and Area Office in Phoenix lacked staff, equipment and technical expertise to adequately analyze the complex issues raised by those permits. When the BIA did not respond, OSM

> assumed that the federal government's trust responsibility concerns were satisfied (even though the Hopi Tribe objected to the 1984 and 1986 permits). Delegation of trust responsibilities to an entity that lacks capability to carry out those responsibilities is itself a breach of trust. While I am convinced that the new Area Director and the staff recently assigned to this project are committed to doing a good job, I seriously doubt whether they have all the necessary resources to thoroughly analyze all trust responsibility coal and hydrology concerns raised by Peabody's pending mine-wide permit application or OSM's proposed permit approval. However, I am aware that the BIA Phoenix Area Office has recently told OSM that the BIA has several serious water concerns like those raised by the Hopi Tribe. (The Environmental Protection Agency has raised concerns similar to those of the BIA and Hopi Tribe in regard to water.)

The Hopi Tribe, its consultant, and recently the BIA and EPA have raised concerns about CSM's analysis of the CHIA and EIS issues. The Hopi Tribe wonders who will resolve the conflicting views of ~~OSM, BIA~~ and EPA? Does any entity recognize a federal responsibility to aggressively protect Hopi water rights? Will OSM make the final decision about how the federal trust responsibility to Hopis is fulfilled? What standards of administrative and judicial review apply?

OSM is viewed in many quarters as being either pro-industry or capable of being influenced by politically powerful but largely invisible industry interests. While OSM has a programmatic mission based on SMCRA, OSM does not have a similar statutory commitment to the trust responsibility. Indeed, in one Hopi administrative appeal, an OSM attorney objected to a claim by the Hopi Tribe's attorney that OSM's conduct should be measured by the federal government's trust responsibility to Indians.

The Hopi Tribe's concern that OSM may give secondary or lesser considerations to the federal government's trust responsibility is based on experience. Regrettably, this sad experience is not unique to OSM. In 1973, the National Water Commission touched on the same theme. In the fifty (50) years following Winters v. United States, 207 U.S. 564 (1908), the lead case recognizing reserved water rights for Indians, the Commission noted that federal policies promoting irrigation and development of arid lands in the west had been "pursued with little or no regard for Indian water rights and the Winters doctrine...In the history of the United States Government's treatment of Indian tribes, its failure to protect Indian water rights for use on the Reservations it set aside for them is one of its sorrier chapters." [National Water Commission, Water Policies For The Future -- Final Report To The President And To The Congress Of The United States 474-475 (GPO 1973) (emphasis added)].

Conclusion

Mr. Chairman, we fear history is repeating itself. For a Tribe whose very life blood depends on protecting precious water resources, this state of affairs is completely unacceptable. Our proprietary rights to water must be vigorously protected by the federal government's trust responsibility. Elevated standards of care and elevated standards of review must apply, just like in conventional trust law. At every stage of administrative or judicial review, the burden must rest on federal agencies dealing with Indian trust resources to prove that their historic trust responsibilities have been fully and fairly discharged. Nothing short of this will serve to protect our interests.

This Committee is to be commended for your efforts to thoughtfully examine this problem. The Hopi Tribe wishes you well in your efforts to make the trust responsibility more meaningful in protecting Indian water rights, and I sincerely thank you for receiving my comments on this occasion.

Finally, Mr. Chairman, allow me to thank this Committee and its staff for its specific assistance in a matter relating to coal royalty evaluation, and for the Committee's meaningful oversight contribution to Native America generally.

Regarding coal royalty evaluation, a recently issued Mineral Management Service (MMS) regulation intended a "revenue neutral" impact on Hopi and other Indian coal royalties. However, as interpreted by certain coal royalty payors, that regulation threatened to dramatically reduce royalty payments. For example, the Hopi Tribe alone was threatened with the loss of $4.8 million between the years 1989 and 1997.

This Committee's interest in this issue, particularly thanks to the efforts of Senator McCain and your fine staff, has resulted in a re-evaluation of any regulatory interpretation that does not achieve "revenue neutrality".

As "revenue neutrality" is an imperative to the Hopi Tribe, I want to express my sincere appreciation to the Committee on behalf of the Hopi people for your leadership in ensuring fair play in this regulatory issue.

Mr. Chairman, I understand that I may be among the final witnesses to appear before this Special Committee. That being the case, allow me to compliment this Committee on your many landmark achievements. In the areas of Tribal responsibility and accountability; the tragic sexual abuse of Indian children; private and public sector neglect and excesses at the expense of Indians; conflicts of interest in representing Tribes; and the discharge of the federal government's trust responsibilities -- this Special Committee has brought new meaning to the concept of oversight -- by overseeing rather than overlooking pressing problems impacting the daily lives of Tribes across this land. The Hopi Tribe, in particular, and I would suggest, all of Native America, commends you and the staff on a job well done. We are, indeed, grateful.

Thank you.